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29

Oct 1

THE OHIO NISI PRIUS REPORTS

NEW SERIES. VOLUME XVIII.

BEING REPORTS OF CASES DECIDED

BY THE

SUPERIOR, COMMON PLEAS, PROBATE AND
INSOLVENCY COURTS OF THE
STATE OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
1916.

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TABLE OF CASES.

Adams Express Co., Wynne v.	409	Davis v. Ohio Mechanics' In-	
Aeolian Co. v. Starr Piano Co.	547	stitute	400
Altman v. Devou	487	Devou, Altman v.	487
American Steel & Wire Co.,		Dispatch Printing Co., Heim-	
Smith v.	305	lich v.	505
Assignment of Louis H. Rice	489	Dover (Village), Parker v. .	465
		Duncan, Seidel v.	193
Bauer, Weber v.	483		
Berry v. Berry	521	Edon, Schieber v.	94
Biddinger v. Steininger-Taylor		Edwards Mfg. Co., Perry v. .	293
Co.	42	Empire State Surety Co., Ho-	
Bieler Sons Co. v. Rist	534	gan v.	380
Blere v. Sterritt	76		
Bode v. Ruehrwein	404	Fassig, State ex rel Turner v.	177
Bostwick, State ex rel Son-		Flannery, Meyer v.	361
nanstine v.	24	Fourth National Bank, Rus-	
Butchers' Union, H. H. Meyer		sell v.	585
Packing Co. v.	457	Francis v. Industrial Commis-	
		sion	266
C., C., C. & St. L. Ry., Short v.	537		
C., D. & M. Ry., Troy Trust		George Bieler Sons Co. v. Rist	534
Co. v.	298	Gillespie & Co., McPherson v.	167
C., N. & Z. Electric Ry., N. &		Green, State ex rel Waltz v. .	97
W. Ry. v.	289	Griffith, State v.	161
Carpenter v. Cincinnati Trac-		Guitner, Westwater v.	209
tion Co.	1		
Casebere, Roderick Lean Mfg.		H. H. Meyer Packing Co. v.	
Co. v.	447	Butchers' Union	457
Central Trust & Safe Deposit		Heimlich v. Dispatch Printing	
Co., Moore v.	175	Co.	505
Cincinnati v. Interurban Ry. &		Hogan v. Empire State Surety	
T. Co.	553	Co.	380
Cincinnati, Tiernan v.	145	Horrigan v. Mendelson	596
Cincinnati, Union Gas & Elec-		Hunter v. Yocum	14
tric Co. v.	615		
Cincinnati Traction Co., Car-		Independence, Kaczmarek v.	81
penter v.	1	Industrial Commission, Fran-	
Cincinnati Traction Co., Rudin		cis v.	266
v.	260	Industrial Commission,	
Cincinnati Traction Co.,		Schmidt v.	305
Wynne v.	409	In re Guardianship of Charity	
Cleveland, Mog v.	49	Ann Robinson	286
Columbus Gas & Fuel Co.,		In re Referendum Petition	
Thornton v.	158	(McDermott law)	140

Interurban Ry. & T. Co., Cincinnati v.	553	Palmer v. State	609
Interurban Ry. & T. Co., Kenning v.	526	Parker v. Village of Dover ...	465
Jackson, State v.	206	Pavey v. Pavey	377
Johnson v. Walker	120	Perry v. Edwards Mfg. Co. ..	293
Juvenile Protective Association v. Roebling	385	Purcell, Klaussen v.	91
Kaczmarek v. Village of Independence	81	Radcliffe, State v.	273
Kenning v. Interurban Ry. & T. Co.	526	Railway v. C., N. & Z. Electric Ry.	289
Kerr Turbine Co., Kirby v. ..	425	Railway, Short v.	537
Kirby v. Kerr Turbine Co. ..	425	Railway, State v.	393
Klaussen v. Purcell	91	Railway, Stockwell v.	29
Krause v. Springfield	129	Railway, Vayto v.	305
Krause, State ex rel Weeks v.	419	Raub, State ex rel Allen v. ..	560
L., A. & S. Ry., State v.	393	Rice, Assignment of Louis H.	489
Lutz, Minnich v.	601	Rist, Geo. Bieler Sons Co. v.	534
McAlpin, Worthington v.	436	River Terminal & Ry. Co., Vayto v.	305
McPherson v. Gillespie & Co.	167	Robinson, In re Guardianship	286
Meeks v. Ryan	355	Roderick Lean Mfg. Co. v. Casebere	447
Mendelson, Horrigan v.	596	Roebling, Juvenile Protective Assn. v.	385
Meyer v. Flannery	361	Rudin v. Cincinnati Traction Co.	260
Meyer Packing Co. v. Butchers' Union	457	Ruehrwein, Bode v.	404
Michel v. Nailor	500	Russell v. Fourth National Bank	585
Minnich v. Lutz	601	Ryan, Meeks v.	355
Mitchell Store Building Co. v. Starr Piano Co.	547	Schieber v. Village of Edon ..	94
Mog v. Cleveland	49	Schlachter, Teepen v.	33
Moore v. Central Trust & Safe Deposit Co.	175	Schmidt v. Industrial Commission	305
Moore, Wallis v.	473	Seldel v. Duncan	193
N. & W. Ry. v. C., N. & Z. Electric Ry.	289	Shimmon v. National Screw & Tack Co.	569
N. Y., C. & St. L. Ry., Stockwell v.	29	Short v. C., C. & St. L. Ry.	537
Nailor, Michel v.	500	Smith v. American Steel & Wire Co.	305
National Screw & Tack Co., Shimmon v.	569	Springfield, Krause v.	129
Ohio Knife Co., Wilde v.	373	Starr Piano Co., Aeolian Co. v.	547
Ohio Mechanics' Institute, Davis v.	400	Starr Piano Co., Mitchell Store Building Co. v.	547
		State v. Griffith	161
		State v. Jackson	206
		State v. L., A. & S. Ry.	393
		State, Palmer v.	609
		State v. Radcliffe	273
		State v. Vourron	581
		State ex rel Allen v. Raub ..	560

TABLE OF CASES.

State ex rel Campbell v. Wesselmann	564	Vance, State ex rel Srofe v. . .	198
State ex rel Sonnanstine v. Bostwick	24	Vayto v. River Terminal & Ry. Co.	305
State ex rel Srofe v. Vance	198	Village of Dover, Parker v.	465
State ex rel Turner v. Fassig	177	Village of Edon, Schieber v.	94
State ex rel Waltz v. Green . .	97	Village of Independence, Kaczmarek v.	81
State ex rel Weeks v. Krause	419	Vourron, State v.	581
Steininger-Taylor Co., Biddinger v.	42	Walker, Johnson v.	120
Sterritt, Biere v.	76	Wallis v. Moore	473
Stockwell v. N. Y., C. & St. L. Ry.	29	Weber v. Bauer	483
Teepen v. Schlachter	33	Wesselmann, State ex rel Campbell v.	564
Thornton v. Columbus Gas & Fuel Co.	158	Westwater v. Guitner	209
Tiernan v. Cincinnati	145	Wilde v. Ohio Knife Co.	373
Troy Trust Co. v. C., D. & M. Ry.	298	Worthington v. McAlpin	436
Union Gas & Electric Co. v. Cincinnati	615	Wynne v. Cincinnati Traction Co.	409
		Yocum, Hunter v.	14

OHIO NISI PRIUS REPORTS

NEW SERIES—VOLUME XVIII.

CAUSES ARGUED AND DETERMINED IN THE SUPERIOR,
COMMON PLEAS, PROBATE AND INSOLVENCY
COURTS OF OHIO.

CONSENTING FRONTAGE FOR A STREET RAILWAY ROUTE.

Superior Court of Cincinnati.

DAVID L. CARPENTER ET AL V. THE CINCINNATI TRACTION
COMPANY ET AL.

Decided, February 24, 1915.

Municipal Corporations—Council Speaks Only Through its Records—Announcement of an Intention to Act—Not Equivalent to Action Carrying Out Such Intention—Invalidity of Street Railway Consents—Granted for Park Property on a Proposed Street.

1. Where by ordinance a franchise is granted by a municipality for the extension of a street railroad partly over an existing street and partly over the same street "relocated," such relocation to be over private property which the municipality has taken no steps to acquire and also over property held by the municipality for park purposes, the consent of the municipality, as a prospective abutting owner, to such street railroad extension can not be counted towards the requisite majority of consenting property owners upon such street.
2. The declaration, in an ordinance authorizing an extension of a street railroad over a certain street, that a portion of the street in question is to be "relocated" between certain points, and that the street railroad extension is to be constructed over said street so to be relocated, is not a substitute for, or the equivalent of an

ordinance to "open, straighten, alter, or divert" such street as required by Section 3715, General Code, for the relocation thereof.

3. The consent of owners of a majority of the feet front abutting on a street along which a street railroad is proposed to be constructed, required by General Code, Sections 3770 and 9105, as a prerequisite to a street railroad grant, is the consent of owners of property abutting upon an *existing* street, and the statute is not satisfied by the *promised* consent of owners of property which will abut upon a *proposed* street, which has never been established by ordinance and the right-of-way for which has never been acquired by the municipality.

Dinsmore & Shohl, for plaintiffs.

Walter M. Schoenle, City Solicitor, for the City of Cincinnati.

Joseph Wilby, for the Cincinnati Street Railway Co.

Robert Marx, for the Cincinnati Traction Co.

MERRELL, J.

The plaintiffs are the owners of property abutting upon that part of Reading road comprised in the long block between Mitchell avenue on the south and Paddock road on the north. They charge that the defendants are about to tear up the street in front of their property and construct thereon street railway tracks with poles, trolley wires and other appliances accessory to a street railway. It is alleged that this construction is about to be entered into by the defendants in pursuance of a pretended ordinance by the city of Cincinnati authorizing the defendant railway companies to construct, maintain and operate an extension of the existing Avondale street railway route over and along that part of Reading road upon which plaintiff's properties abut, and thence by alternative routes to Bond Hill.

The construction of tracks necessary for this extended route is sought to be enjoined upon several grounds, of which one, and perhaps the chief one, is that the franchise ordinance is not supported by the consents of a majority of the property abutting upon the proposed route. It is admitted that the required majority of consents has not been obtained for that block of Reading road upon which plaintiff's properties abut, but it is contended that the consent of the city of Cincinnati given for city-owned property abutting on a proposed re-location of a

1915.]

Carpenter v. Traction Co.

section of Reading road immediately to the north establishes a consenting majority of frontage upon the entire street.

Reading road, formerly an old turnpike road, is one of the chief arteries of travel from the center of Cincinnati to suburban districts. This road is now occupied for a long distance by the double car tracks of what is known as the Avondale line. This Avondale line as at present constructed, leaves Reading road before it reaches the block upon which plaintiffs' properties abut and proceeds over Mitchell avenue, a road leading to the west from Reading road, the main direction of the latter being north and south. Reading road itself from the point where it is intersected by Mitchell avenue continues in a northerly direction for the long block upon which the plaintiffs reside. At the northerly terminus of this block Paddock road strikes off to the west for a short distance, turning then to the north and passing through part of the suburb known as Bond Hill. Reading road itself, as it has always been known, continues in a general northerly direction, but shortly after leaving its intersection with Paddock road makes a bend, swinging around the easterly side of the hill until it resumes a more or less straightaway course which the plat shows to be substantially a continuation of its course south of the Paddock road intersection. The controversy in this case has to do with the proposed re-location or straightening of Reading road whereby in place of the bend or curve referred to and now existing, a straightaway course is laid northwardly from a point near the Paddock road intersection. This straightaway course, which will be referred to as the re-location of Reading road, or the re-located portion of Reading road, does not now exist in the physical form of a roadway available for travel, but extends through property which as to its southern portion is now held in private ownership, and as to the northern and larger portion extends through park property of the city of Cincinnati, commonly known as Blachly Farms, or Avon Field.

On December 16th, 1913, the council of the city of Cincinnati passed an ordinance No. 711-1913, entitled an ordinance "authorizing the Cincinnati Street Railway Company and the Cincinnati Traction Company to construct, maintain and operate an

extension of the Avondale route over and along Reading road and California avenue, or Reading road and Paddack road." The California avenue referred to is one running west from Reading road in the suburb of Bond Hill and has no immediate connection with the controversy in this case. The ordinance, No. 711, is too long to be set out in full. By the first section of the ordinance the street railway companies are authorized to construct and operate an extension of the Avondale route over one of two courses set out. The first over Reading road from Mitchell avenue to Paddack road and thence over Paddack road (this route being referred to as the Paddack road route), the second starting from the intersection of Reading road and Mitchell avenue, thence north upon Reading road, including the re-located or widened portions as hereinafter described, to the intersection of Reading road and California avenue (this route being referred to as the Reading road route).

By Section 2 of the ordinance the street railway companies are required to accept the Paddack road route within thirty-five days, and within one hundred and twenty days thereafter file with council the required majority of consents of the owners of property abutting both upon Reading road and upon Paddack road. It is provided that upon the acceptance of the Paddack road route all rights to the Reading road route shall cease and determine. It is further provided:

"If within thirty-five days after the passage of this ordinance said companies file with the clerk of this council their written acceptance of this ordinance including all the terms and conditions thereof, and further file within one hundred and twenty days after the passage of this ordinance with the clerk of this council their written expression of their choice of said Reading road route then upon the filing of said acceptance and exercise of choice, all the rights, privileges and franchise to construct, maintain and operate said extension over said Paddack road route shall not go into force and effect and shall cease and determine and said extension shall be constructed, maintained and operated over said Reading road route."

It is agreed that the street railway companies have failed to take advantage of the option for the Paddack road route, and

1915.]

Carpenter v. Traction Co.

that they have accepted the ordinance upon the alternative of the Reading road route. There is, therefore, at this time no franchise over Paddack road, and the only rights in the nature of a franchise are confined to the Reading road route.

By Section 3 of the ordinance it is provided that from

“a point not exceeding two hundred feet north of the north line of the intersection of Reading road and Paddack road (said point to be selected by the director of public service and approved by this council) and the intersection of Reading road and Blachly avenue, the said Reading road route shall not be located upon Reading road as at present located but upon Reading road re-located, so as to shorten and straighten same, said re-located portion of Reading road to be from said intersection of Reading and Paddack roads or said point on a tangent or approximately a tangent to the intersection of Reading road and Blatchly avenue.”

By this description of Reading road re-located is meant the straightaway course which I have above described, cutting off that portion of the present road which curves around the hill-side. It is in evidence that the re-location is 2100 feet long as against a length of 2650 feet for the corresponding portion of the existing roadway. The general line of the relocation provides a straightaway course and eliminates curves in the present roadway which it is agreed are dangerous to traffic. The following provisions of the ordinance are of special importance as they constitute the basis for the bringing of this suit at the time it was brought:

“The commencement of the work of construction of said extension along said Reading road route shall be within thirty days after the said shortening, straightening, re-locating and widening of Reading road at said two places shall have been commenced by the city.”

At the hearing of this case it was apparently assumed by counsel for the plaintiffs and by the city solicitor that shortly before the bringing of this action the city had “commenced” the re-locating of Reading road, and that the street railway companies were therefore under obligation to commence their work of construction of the street railway extension within thirty

days. Hence the plaintiffs sought to assert their rights by instituting this action.

The remaining provisions of the ordinance need not be set out or referred to, with the exception of the final section:

"Section 8. Consent of the city of Cincinnati is hereby given for any and all property of said city abutting or which may abut upon each and all of said streets; this consent being to the construction, maintenance and operation of the above described street railroad extensions in accordance with the provisions of this ordinance."

It is agreed that the frontage for which the city has undertaken to consent is greater than the frontage controlled by the plaintiffs. Hence if the latter's property and that owned by the city be considered as abutting upon one and the same street, the street railway franchise over Reading road is supported by the requisite majority of consenting property owners.

The theory, as I understand it, of counsel for the city, is that by the provisions of the ordinance above set out in part, followed by the actions of the city authorities subsequent to the passage of the ordinance, the re-location of Reading road is in legal contemplation an established fact, and that hence the moment the city undertakes any work looking to the physical carrying out of re-location, the street railway companies are thereupon authorized to begin the laying of tracks, and, in fact, required to begin this work within thirty days.

It becomes necessary, therefore, to consider what action was taken by the city of Cincinnati through its council or other officials subsequent to the passage of the franchise ordinance concerning the same subject matter. On July 15th, 1914, there was passed an ordinance providing for the issue of bonds in the sum of \$60,000 "for the purpose of providing funds to pay the cost and expense of opening, extending and improving Reading road on its re-located lines," (north of Paddock road) "and purchasing and condemning the necessary land therefor." The bonds thus provided were issued and sold and the money is in the treasury. On November 17th, 1914, an ordinance was passed authorizing and directing the director of public service to make

1915.]

Carpenter v. Traction Co.

expenditures for the improvement of Reading road on its re-located line by constructing a culvert. In pursuance of this ordinance the director of public service advertised for bids for this culvert, received bids for the work at a figure in the neighborhood of \$3,300, and rejected all bids. On March 10, 1914, the city engineer transmitted to council plans for the proposed re-located road. These plans were approved by council on April 21, 1914. On June 23rd, 1914, the engineer was requested to transmit to council an estimate for the work of re-location. This estimate was ordered filed by council July 15th, 1914. Within the present month, and long after this suit was filed, council directed (February 2d, 1915) that a plat and resolution be submitted showing property to be appropriated for the proposed re-location of Reading road.

The foregoing is a statement of the only action that has been officially taken by the city of Cincinnati, the city council or any public official. It appears in evidence, to be sure, that for the past six months the chief assistant engineer in charge of highways has been diligently engaged in making and revising plans and estimates for the proposed re-located road. These plans and estimates, however, are manifestly tentative only, and they have never been transmitted to council and, therefore, have not been acted upon or given any aspect of finality. At the hearing certain city officials were called, and it was offered to be shown on the part of the city, that these officials were genuinely intent upon carrying out the construction of the roadway. Manifestly, however, the opinions, intentions and policies of public officials are not the equivalent of official action which can alone be considered in the determination of the issues presented.

The record of the city as shown by its official action being such as has just been stated, the question presents itself at the threshold of this case whether the re-location of Reading road is an accomplished fact, or on the other hand, is a mere proposal hereafter to be carried out, in other words, a mere policy to which city council has committed itself. If the re-located portion of Reading road be indeed an existing road at the present time, the action of the director of public service in calling for bids for some part of the work in contemplation, might con-

ceivably constitute a "commencement" of work in the phrase of the ordinance, and after such "commencement" the street railway companies are under obligation within thirty days to begin the work of extending tracks. Upon this theory the bringing of the present action by the plaintiffs is a timely assertion of whatever rights they may have. On the other hand, if upon the record, the re-location is a mere project of the city of Cincinnati as distinguished from an existing road, then the institution of this suit may turn out to be premature.

Referring to Section 3 of the franchise ordinance which deals with the subject of re-location, we find that

"said Reading road route shall not be located upon Reading road *as at present located*, but upon Reading road re-located, * * * said re-located portion of Reading road *to be* from said intersection of Reading and Paddock roads."

And later,

"such re-location, straightening or widening *to be* such as *will locate* said Reading road on a tangent."

And again it is provided that street railway work

"shall be begun not later than thirty days after such re-located, and straightened or widened portions *shall have been duly laid out and graded*."

Considering nothing more than the above language employed in the ordinance, the inference is a natural, if not an inevitable one, that council did not assume by its action to re-locate Reading road, but merely signified its intention so to do. However, the interpretation of what was actually accomplished by the ordinance in question on the subject of re-location need not be left to the construction of the language used. The action requisite by council for the making, altering or straightening a public road is distinctly provided by Section 3715 of the Code of Ordinances, as follows:

"When it deems it necessary, the council may open, straighten, alter, divert, narrow or widen, any street, alley, or

1915.]

Carpenter v. Traction Co.

public highway within the limits of this corporation. The council shall provide by ordinance therefor, which shall briefly and in general terms describe the part, if any, of the street, alley, or public highway to be abandoned by reason of such change thereof, and the property, if any, to be appropriated for such purposes. The proceeding for such appropriation shall be as provided for the appropriation of property for other municipal purposes in this title."

By no process of construction however liberal, can it be said that the franchise ordinance for the Bond Hill extension is an ordinance to straighten, alter or divert Reading road or any part thereof. It is furthermore to be borne in mind that the proposed re-location traverses property part of which is still in private possession and part of which, so far as the evidence discloses, is held by the city of Cincinnati for park purposes. Even if proper steps have been taken to transfer what has hitherto been property held by the city of Cincinnati for park purposes and to vest the same in the city for road purposes—a fact which does not appear—no step whatever has been taken by the city to acquire a right of way for a roadway over private property. In order for the city to acquire the latter right, it is necessary for the present owners of the property in question to grant or dedicate the same to the city for a roadway, or for the city to take appropriate steps to acquire the property by process of eminent domain. No such steps have in fact been taken. It is entirely possible that the city council will refuse to pass the necessary resolution and ordinance to appropriate this property. Even if it be assumed that every individual member of council and every city official concerned is willing and desirous to take the action indicated, the situation is not changed in the slightest. The actions and even the intentions of a municipal corporation are those only which are evidenced by the *official* acts of the municipal legislature and public officials. A municipal council speaks by its records, and not by the intentions of its members individually expressed.

It will readily be seen from the foregoing record of official action on the part of the city council, that the latter has not committed the city with any finality to locate or re-locate

a road upon the lines proposed. True, the city, by the sale of bonds, has in its treasury \$60,000 set aside for this purpose, but if council takes no further action to establish or re-locate the roadway in question, the only result will be that these funds will pass to the city's sinking fund to redeem the bonds.

It is, of course, true that a street may exist in legal contemplation, although its surface has never been prepared for public travel. It by no means follows, however, that a city council by its promise of future action, embodied in an ordinance granting a street railroad franchise, can create a street (or re-locate one) over property which the city does not own and which it has taken no steps to acquire.

It follows from what has been said that the so-called re-located portion of Reading road is not now a "street or public way" with reference to which an abutting owner may give his consent to the construction of a street railway. To be sure the city of Cincinnati has by Section 8 above quoted of the franchise ordinance, given its consent to the construction of street railway tracks over Reading road when re-located. Yet in view of the fact that the property as to which the city has consented abuts not upon a street or public way, but only upon a promised street, the so-called consent of the city is not a consent *in praesenti*, but merely a promise to consent when the proposed road is established.

The statute laws of this state provides in connection with the grant of street railway franchises as follows:

"Section 3770. No such grant shall be made, except to the corporation * * * that * * * shall have previously obtained the written consent of a majority of the property holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed."

And

"Section 9105. No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the

1915.]

Carpenter v. Traction Co.

feet front of the lots and *lands abutting on the street or public way*, along which it is proposed to construct such railway or extension thereof; and the provisions of all ordinances of the council relating thereto, have in all respects been complied with, whether the railway proposed is an extension of an old or the granting of a new route."

This section contemplates beyond all doubt the existence of a "street or public way" before a consent with reference thereto is operative. Inasmuch therefore as the so-called re-location of Reading road is not now an existing "street or public way" the consent of the city as an abutting property owner is not such a consent as under the statute can be counted to make up a consenting majority of abutting frontage. It is admitted (subject to a qualification to be noticed later) that without the consents of the city of Cincinnati there have never existed and do not now exist sufficient consents to permit the laying of tracks for the Bond Hill extension on the Reading road route.

The present controversy must, therefore, be determined upon a single issue of fact. The so-called re-location of Reading road is a thing altogether of the future. It does not now exist for the purpose of computing consenting frontage upon Reading road. Upon the existing state of facts, therefore, the plaintiffs by refusing for their respective properties to consent to the street railway extension, have exercised an effective veto upon the laying of tracks and like construction in the street in front of their properties.

As this court is without jurisdiction to inquire into the purpose or animus of non-consenting abutters (*Traction Co. v. Parrish*, 67 O. S., 181; *Cleveland v. Railroad*, 3 C.C.(N.S.), 563, the conclusions already expressed are apparently sufficient for the drafting of the proper decree. However, the pleadings and evidence must again be adverted to.

The petition charges that "the defendants" (meaning doubtless the street railway companies) "are now about to tear up the street in front of the property of the plaintiffs and construct thereon street railway tracks." Whether by inadvertence or otherwise, there was no proof, at the trial, that such action was impending or really threatened. In the joint answer of the

railway companies, "the Cincinnati Traction Company further admits that it intends to construct and operate said street railway line in accordance with the terms and conditions of said ordinance." This admission is not an admission of the threat charged in the petition, but is purely argumentative. If the defendants intend to proceed only "in accordance with the terms and conditions" of the ordinance, it may be doubted if they will proceed at all under the existing state of fact. Relief by injunction should not be granted, except to prevent damage to property rights that is real and imminent. I am of opinion, therefore, that the petition should be dismissed without prejudice to the re-assertion of plaintiffs' alleged rights upon a different state of facts. If, however, defendants' alleged threats can be shown by other evidence or by admission, the case will be reopened for that purpose.

In reaching the conclusion thus indicated I have omitted one phase of the case which may be briefly dealt with. It is the admitted fact that eliminating from all consideration the "re-located" portion of Reading road, the proposed street railway extension will traverse a further section of the road as at present located (north of the re-located section); that property owners upon this northern section of Reading road have given consents in such amount as to produce a majority of consenting frontage upon *all* of Reading road, *excepting* the re-located portion. Counsel for the city contends that the requisite consents are thus shown. This contention can not be agreed to. The statute invoked by the plaintiffs contemplates as a prerequisite to street railroad construction, a majority of consenting frontage on each street to be occupied (*Cable Co. v. Neare*, 54 O. S., 153) and two remote sections of a street can not be counted as one for the purpose of imposing upon the abutters of one section of a street the will of those owning property upon another and distant section.

The allegations of the petition raise other issues, already indicated, of the gravest importance. Much of the oral argument and the able briefs of counsel deal with these issues. Thus it is urged that the "re-location" when made will not be a part of Reading road, but will be a new and independent street. A

1915.]

Carpenter v. Traction Co.

re-location it is insisted, necessarily involves a vacation of the corresponding portion of the old street. Again it is contended upon the supposed analogy of *Carpenter v. Traction Co.*, 13 N.P.(N.S.), 81, that when the sole or predominant purpose of a "re-location" is to obtain the consents of prospective abutters to street railroad operation, and thereby out-vote non-consenting abutters upon neighboring portion of the same street, such proceeding is in legal contemplation "a sham and pretense," and ineffective for the purpose.

It is well understood that a judicial determination of these issues is of prime importance, not only to the parties to this case but likewise to the residents of Bond Hill whose hopes of obtaining street car facilities are directly or indirectly at stake. Although appreciating this situation, such as I am led to infer it, yet I can not assume to pass upon questions not at issue upon the evidence presented. Upon the record, the proposed re-location of Reading road is not now an established street, and the precise form in which the city may hereafter act can not be foretold or the scope of its future legislation be assumed. A present expression of opinion upon these questions would consequently be without judicial sanction, and not binding upon this or any other court. Such expression would therefore be not merely useless, but doubtless, also improper.

A decree may be drawn in accordance with this opinion.

February 24th, 1915.

**JURISDICTION TO SELL PROPERTY OF A DECEDENT
TO PAY DEBTS.**

Common Pleas Court of Champaign County.

MARY F. HUNTER, ADMINISTRATRIX, v. GRACE YOCUM ET AL.

Decided, 1914.

Jurisdiction to Sell Property to Pay Debts—Can Not be Entertained After the Filing and Confirmation of a Final Account by the Administrator Showing no Debts Against the Estate—Proper Method of Correcting Such an Account.

1. The court of common pleas is without jurisdiction to grant an order upon petition of an administrator to sell real estate to pay debts, where it appears from the records of the probate court that the said administrator has filed a final account which disclosed no debts and the estate has been closed.
2. There is no authority in the probate court to set aside the final account of an administrator and reopen the estate, where no exception was filed by a party in interest within eight months of the settlement of said account, which is conclusive unless attacked for fraud or corrected by the court upon the filing of a subsequent and correct account; but where a mistake has been made in the former and final account as to the existence of debts against the estate and credits due the administrator, said former and final account may be opened up by the probate court upon the filing of a subsequent account showing the existence of such debts and credits.
3. Property may be sold by an administrator to pay debts not yet due, especially where it appears that the creditor is willing to accept the money.

Deaton & Bodey and W. F. North, for plaintiff.

Johnson & Miller, contra.

MIDDLETON, J.

This is an action brought by the plaintiff, as administratrix with the will annexed of the estate of Albert L. Hunter, deceased, v. Grace Yocum, Quinn Yocum, Edna Kizer, Alva Kizer, Elsie Lemon, Daniel Lemon, Dorothy M. Swisher, a minor aged

1915.]

Hunter v. Yocum.

seven years, and Mary F. Hunter, individually, to sell certain real estate described in the petition to pay the debts and costs of administering the estate of the said Albert L. Hunter, and is before the court upon the pleadings and evidence offered upon the hearing of the application for such sale.

Briefly, the petition avers the appointment and qualification of plaintiff as such administratrix; that there remains unpaid debts of plaintiff's decedent to the amount of \$6,600; that she has paid out of the personal property coming into her hands debts amounting to \$3,500; that the costs of administration will amount to about \$75; that the total value of the personal estate and effects now in the hands of plaintiff is about \$100, and is insufficient to pay the debts and costs. The right of the plaintiff to an order directing a sale of the real estate is contested by the defendant, Edna Kizer, a daughter and legatee under the will of the said Albert L. Hunter, and in an amended answer filed to the petition of plaintiff she admits that said deceased was the owner of real estate described in the petition, together with other real estate, at the time of his death, the appointment and qualification of plaintiff as administratrix, and that the real estate described in the petition is unencumbered, but denies each and every other allegation in the petition set forth. And further answering to the petition she in substance avers that about April 29th, 1911, the estate of Albert L. Hunter was fully settled up; that the plaintiff had theretofore been acting as administratrix, and that the inventory filed by her in the estate showed there was \$2,784.50 of personal property; that upon filing her final account she had disposed of \$257.02 and contributed to pay the debts of said estate the sum of \$145.15, making a total payment of debts and expenses paid by her of \$402.17, and that she had taken and kept and appropriated to her own use all the rest and residue of said personal estate, as legatee under said will. And she alleges (omitting a certain claim that was eliminated from the consideration of the court in this case by agreement of counsel) that the debt for which the sale of the real estate is sought is a note for \$4,000 secured by a mortgage on other real estate

than that described in the petition herein, and that at the time of the settlement of said estate, plaintiff being the owner of a life estate in said land, preferred and desired not to sell land to pay said claim but to carry the same as a lien on the land by which it was secured, and by acquiescence of all legatees and devisees under said will, and by said Ohio Farmers Insurance Company, said claim was left a lien on said mortgaged land, and plaintiff, being a life tenant, cut and sold timber of much more value than was sufficient, together with said personal property, to have paid the debts of said estate, and that plaintiff does not desire to sell said land to pay debts of said Albert L. Hunter, but has made a contract to sell the tract of land in the petition described, and has received money on the same, but being unable to convey the title, by reason of having only a life estate, seeks an order of this court under the guise of an order to sell land to pay debts in order that she may carry out her said contract.

Wherefore, she further says that by reason of these acts of the plaintiff in settling up said estate, and taking and appropriating the personal property to her own use, instead of applying same to payment of debts, and by voluntarily contributing \$145.15 towards the payment of debts of said estate, until the identity of said personal property is changed and lost, etc., plaintiff is estopped from asking to sell said real estate for paying said alleged and pretended debt.

Wherefore, she prays that the action be dismissed, and for all other proper relief.

For reply to this amended answer plaintiff, Mary F. Hunter, as administratrix, in substance admits that an inventory and account was filed by her in said estate, but denies that said estate was fully settled up at the time of filing said account, and says said account was not a correct and true statement of the conditions of said estate at that time; that said account was filed without the legal force and effect of same having been explained to plaintiff, she being without experience in such matters, but upon the true facts having been made to appear to the probate court, said court made an order upholding said account as a first account in order

1915.]

Hunter v. Yocum.

that said estate might stand open for further proceedings. She admits that the unpaid debts of said estate are the \$4,000 debt of the Ohio Insurance Company, but denies each and every other allegation that defendant's amended answer contains.

The question for determination, therefore, under these pleadings and the evidence offered, is whether plaintiff is entitled to an order to sell this real estate to pay the debts referred to, and the costs and expenses of administering the estate.

The evidence shows that Albert L. Hunter died August 23, 1909, leaving personal property of the appraised value of \$2,748.50, and real estate consisting of a tract of 123 acres and a tract of 79 acres, the latter tract being the one described in the petition, and to sell which this proceeding is brought. It is also shown that the plaintiff, since the death of her decedent, has cut from the land timber amounting to \$3,500; that one horse of the value of \$200 died, making a total of \$6,048.50 chargeable to the plaintiff, as administratrix, subject to the payment of the debts of her said decedent; that she has paid debts owing from the estate to the amount approximately of \$4,500 and that there remains in her hands of the amount chargeable to her subject to the payment of debts and costs of administration, approximately \$1,500, which is not sufficient to satisfy the debt of \$4,000 and interest still standing against the estate. And if there were no further questions for the court to determine it would find no difficulty in granting the order prayed for, to sell the real estate described, to pay the balance of this debt, and the costs of administration. But under the answer and reply and the evidence complications arise calling for a determination of other questions before said order can be granted.

First: It appears from the evidence that the \$4,000 debt due the insurance company is evidenced by a note, which will not fall due until June 11, 1914, and it further appears from the evidence that on March 3, 1911, the plaintiff, as administratrix, filed with the probate court of this county a first and final account of her transactions as such administratrix; that she charged herself with having received on behalf of the estate

\$402.17, and credited herself with having paid out on behalf of the estate the same amount of \$402.17. She included in the account a statement that the balance of all property shown in the inventory was retained by her as sole legatee under the will of her decedent, and that on the 29th day of April, 1911, the probate court settled this account, and that the following entry was entered upon the journal of said court.

"In the Matter of the Estate of Albert S. Hunter, Deceased.
First and Final Account. Order of Settlement.

"Notice of the time for hearing and settlement of the first and final account of Mary F. Hunter, as administratrix of and, etc., of the estate of Albert L. Hunter, deceased, having been published and no exceptions being filed thereto, said account was this date examined by the court, found correct and approved and confirmed, and the court allowed said administratrix the sum of \$24.23 as compensation in full for all her ordinary services rendered.

"The court finds that said administratrix has received and disbursed the sum of \$402.17. The said account is duly balanced, and the said estate is duly settled according to law.

"It is therefore ordered by the court that this account in settlement thereof be recorded, and that said administratrix pay the costs herein taxed at \$4.96.

"Dated April 29, 1911.

"G. P. SEIBERT, *Probate Judge.*"

It further appears from the evidence that on October 12, 1912, the plaintiff, as administratrix, filed with the probate court an application to have this first and final account held as first account and the estate reopened, in which she represented to the court that at the time of the filing of said account and of said order of settlement, said estate had in fact not been settled: that there were at the time unpaid debts of the decedent in the sum of \$6,500, and that she had paid \$2,500 of said indebtedness, and that there remains unpaid a mortgage indebtedness of \$4,000 against said estate, and asking in such application that the order of settlement of said account be set aside and held for

1915.]

Hunter v. Yocum.

naught, and that said account be held as a first account, and that an order be made reopening said estate for further proceedings according to law. And the evidence further shows that on October 12, 1912, nearly one year and six months after the order settling the account had been made by the probate court, that court upon this application of the plaintiff, as administratrix, ordered that said account, which purported to be a first and final, account be held for naught, and that said account be held as a first account and that said estate be opened up for further proceedings according to law. It is claimed by Edna Kizer, the answering defendant, who contests plaintiff's right to sell real estate in this action, that the probate court having ordered this account settled as a final account of the plaintiff, as administratrix, that this court is without jurisdiction or authority to grant to her an order to sell real estate to pay debts; and this raises a question the court desires first to consider.

Section 10820 of the General Code, requires of every executor or administrator that they shall render an account of his or her administration upon oath, and in like manner render such other accounts thereof every twelve months thereafter, and at such other times as the court requires, until the estate is wholly settled.

Section 10834 provides when an account is settled in the absence of a person adversely interested, and without actual notice to him, it may be opened on his filing exceptions to the account within eight months thereafter.

Section 10835, provides upon every settlement of an account by an executor or administrator all former accounts may be so far opened as to correct any mistake or error therein.

In *Watts v. Watts*, 38 O. S., 480, the Supreme Court in construing provisions of Section 6187, Revised Statutes, now Section 10835, General Code, says:

"That the power conferred by Section 10835 includes the power to correct all errors or mistakes of the court as well as of the executor or administrator found in former settlement, whether as to items embraced in or omitted from said former accounts."

And in a later case, *Lambright v. Lambright*, 74 O. S., 198, the same court says:

“Upon settlement of an account all former accounts may be opened to correct mistakes or errors even though no exceptions were filed to the original account.”

It seems, therefore, clear to this court that if the plaintiff in this case, as administratrix, made a mistake in filing her first and final account of her administration in the probate court on the 29th day of April, 1911, and omitted by mistake to credit herself with amounts paid out by her, or to charge herself with amounts received by her as such administratrix, such mistake or mistakes might have been and still may be corrected upon settlement of any subsequent account by her, and it seems also clear to the court from examination of the authorities that the account having been settled by the order of the probate court, it must stand as conclusive against the plaintiff, and as between her and the estate until opened up and corrected upon the filing of a subsequent account, or is opened up under the provisions of Section 10834, General Code, which is as follows:

“When an account is settled in the absence of a person adversely interested, and without actual notice to him, it may be opened on his filing exceptions to the account within eight months thereafter.”

In the opinion of the court, the probate court was without jurisdiction or authority, no exceptions having been filed within eight months from the date of the settlement of the account as a final account by a person adversely interested as provided in Section 10834, General Code, and no account being then filed by the plaintiff as administratrix asking for the correction of a mistake in said final account as provided by Section 10835, General Code, to make the order appearing upon the journal of said court of the date of October 12, 1912, ordering that said final account be held for naught, and as a first account only, and that said estate be opened up for further proceeding according to law.

1915.]

Hunter v. Yocum.

That the judgment of the probate court settling the final account of an executor or administrator becomes conclusive and absolute, and can not be attacked except for fraud, seems clearly settled by a very late case cited by our Supreme Court in the case of *Crawford, Administrator, v. Zeigler et al*, 84 O. S., 224.

The syllabus of the case reads as follows:

“After the expiration of the eight months allowed by Section 6187, Revised Statutes, or Section 10834, General Code, for filing exceptions when the account is settled in the absence of a person interested and without actual notice to him, the judgment of a probate court settling the final account of an executor or administrator becomes absolute and conclusive and can not be attacked except for fraud of the prevailing party.”

In this case the court considers very fully the constitutional and statutory provisions in Ohio vesting the probate court with jurisdiction in probate and testamentary matters, the settlement of accounts of executors, administrators and guardians, citing Section 8, of Article IV of the Constitution, and Section 10492, General Code, and among other things says:

“This court has many times declared that the probate courts of Ohio are in the fullest sense courts of record; they belong to the class whose records import absolute verity, that are competent to decide their own jurisdiction, without setting forth the fact and evidence on which it is rendered.

“The judgment of the probate court is just as conclusive and binding upon the parties as would be the judgment of any other court, and before the judgment of any court can be opened up and set aside, it must appear that the court had no jurisdiction of the parties to the action, or of the subject-matter of the suit, or that the judgment was obtained by fraud of the prevailing party.”

So the probate court, being as this court believes, without authority or jurisdiction for the reasons before stated, to make the order that the former order of the court settling the account of the plaintiff, as administratrix, as a first account be held for

naught and the estate opened up, such order of the probate court must remain absolute and conclusive between the parties, unless corrected by the court upon the filing of a subsequent account or attacked for fraud. This being so of this account and the settlement of the same by the probate court showing a final settlement, and all indebtedness from the estate paid and satisfied, so long as the order of the probate court stands uncorrected in the proper manner, this court would have no authority or jurisdiction to order the sale of the real estate, to pay the debts of the deceased. If it were not for the order and judgment of the probate court, this court would have no doubt of its jurisdiction under Sections 10774 and 10775, General Code, to determine what debts, if any, of the estate of plaintiff's decedent, remained unpaid, and in doing so to determine, without the same having been previously allowed or passed upon by such court, what valid and existing debts were owing from said estate. This court would have as full and complete authority in a proceeding of this kind to determine the amount of indebtedness of an estate, and what were valid and lawful debts against the estate as the probate court, and could determine under other provisions of the statutes the rights of all parties interested, and this court would entertain no doubt of its right and power to direct the sale of this real estate to pay the debt of \$4,000, payable to the insurance company referred to in the pleading, notwithstanding the same does not fall due until July 11, 1914. Especially so in this case as the court is satisfied that the payee of the note evidencing this debt is willing to accept the money.

Section 10735 expressly confers power upon an executor or administrator to pay debts not yet due, and this power, the court thinks, impliedly carries with it authority in a court of competent jurisdiction to order the sale of real estate of the deceased to pay such debts. The court feels satisfied also from the testimony in this case that the administratrix has acted in perfect good faith in paying off the indebtedness of the estate; that she has not profited nor the estate suffered by her failure to comply with the statutes in disposing of the personal property, and ap-

1915.]

Hunter v. Yocum.

plying the proceeds to the payment of debts. And basing its opinion upon the evidence adduced in this case, the court entertains no doubt, but that the probate court, upon the filing of a second account by the plaintiff, as administratrix, will correct the mistake that was made in what purported to be a final account, and permit the plaintiff to have credit for whatever amount she has paid out in actual liquidation of debts owing from the estate. I do not think the contention of counsel for defendant is well founded, that she took and appropriated the personal property of the estate as sole legatee under the will. She could not have or take this property, or any interest in the same, as legatee until the debts were paid, and in acting in good faith and believing it to be the best interests of the estate and all concerned, she disposed of the personal property without advertising and selling the same as the statutes direct, and applied the proceeds to the payment of debts, this court is of opinion she should receive credit for the same upon the settling of her account as administratrix.

If upon the filing of such second account it appears that there are still debts unpaid, this court is of the opinion that she would be entitled to an order to sell real estate to pay the same. In view of the record, however, as it now stands in the probate court, this court is of the opinion that it can not properly grant such order, and the application is refused.

**VALIDITY OF FINDING AS TO THE OWNERSHIP OF
PROPERTY.**

Court of Common Pleas of Franklin County.

STATE, EX REL LEONA SONNANSTINE, v. HOMER Z. BOSTWICK.

Decided, 1915.

Execution—Three-Fourths Jury Law—Not Applicable Where the Issue Submitted is the Right of Property Levied Upon, Under an Execution—Order of Justice May be Reviewed on Error.

The finding of five disinterested electors to whom has been submitted the determination of the right of property levied upon under an execution is not governed by the three-fourths jury law, and mandamus will not lie to compel a justice of the peace to render judgment on a finding of the five electors so impaneled, but such an order may be reviewed on error in the common pleas court.

Joy H. Hunt, for plaintiff.

C. E. Blanchard, contra

KINKEAD, J.

This action is brought to require the defendant, as justice of the peace, to render judgment upon what is claimed to have been a legal verdict in proceedings in the trial of right of property, under Section 11742, General Code. Under an execution issued in *Midland Grocery Company v. W. W. Tootle*, the sheriff levied upon an automobile alleged to have been owned by the relator. The defendant, as justice, summoned five jurors, who after deliberation returned with a verdict signed by only four men. The justice instructed them to return for further consideration, and that the verdict should be unanimous. They returned the foreman stating that they could not agree upon a verdict. The verdict signed by the four was lodged with the justice, and is among the papers now before the court. All of the jurors gave testimony, the four who signed the verdict, that it was their verdict, while the fifth, the foreman,

1915.]

Sonnanstine v. Bostwick.

stated that it was not his verdict. The cause was continued, and a new jury was summoned, whereupon this proceeding was brought to test the question. It is claimed by defendant that this is not the proper remedy, but that error should have been prosecuted.

The question is whether under an act passed February 6, 1913 (103 O. L., 13), relative to three-fourths jury applies to this kind of a proceeding.

The character of this proceeding must first be determined before either the propriety of the remedy pursued herein, or the applicability of the amended jury law, can be decided.

Section 10223, General Code, provides:

Unless otherwise directed by law, the jurisdiction of justices of the peace in civil cases, is limited to the township wherein they reside.

Other statutes confer jurisdiction in particular matters, such as solemnization of marriages, acknowledgments, in forcible entry and detainer, attachments, garnishment, over non-resident, etc. Sections 10224, 10225, General Code.

Justices of the peace are given exclusive original jurisdiction in civil actions for the recovery of sums not exceeding \$100, etc. Section 10226, General Code.

Exclusive jurisdiction is given in replevin (Section 10230, General Code) and in certain actions in which the title to real estate may be drawn in question, trespass, proportion of expense in obtaining evidence in surveys to fix corners or settle boundary lines, Section 10231, General Code.

Provision is made for the commencement of actions, summons, service, etc. (Section 10233, General Code), for an order of attachment "in a civil action before a justice" (Section 10253, General Code), and garnishment therein.

"In all cases before a justice," a bill of particulars of the demand is to be filed (Section 10303, General Code) which must state the cause of action (Section 10304, General Code). Detailed provision is made for the trial of civil actions, for a jury, verdict, and the usual matters pertaining to the same. for judgment, appeals, etc.

Section 10382, General Code, provides:

"In all cases, not otherwise specially provided for by law, either party may appeal, from the final judgment of a justice of the peace," etc.

Special provision is made for procedure in forcible entry and detainer (Section 10447, General Code, *et seq.*), for replevin (Section 10462, General Code), without special designation as to the nature or character of such cases. But of course they are civil cases or actions.

The proceeding authorized by Sections 11741, 11742 and 11743, General Code, is a civil proceeding for the trial of the right of property upon which a levy of execution from a court of record has been made. It is not a civil action in the sense that the actions, or civil actions, provided for by the statutes prescribing the jurisdiction of justices. When ownership of the property is claimed by one other than the execution defendant, the execution officer is required to give written notice to a justice of the peace, setting forth the names of plaintiff and defendant, and a schedule of the property.

It is then made the duty of the justice to immediately make an entry on his docket, and issue a summons, directed to the sheriff or any constable of the county, commanding him to summon five disinterested men, electors, to appear to try and determine the claimant's right of property.

The justice is required to enter the receipt of the notice and schedule, and to make an entry on his docket. He must then issue a summons directed to the sheriff or a constable for five disinterested men, who are electors, to try and determine the claimant's right to the property in controversy. The claimant is required to give two days' notice of the trial to the party in whose favor the execution was issued.

"If the jury finds that the right to the goods and chattels, in whole or in part, is in the claimant, they also shall find the value thereof, and the justice shall render judgment upon such finding for the claimant, that he recover his costs against the plaintiff in execution. * * * and also have restitution of

1915.]

Sonnanstine v. Bostwick.

the goods and chattels, * * * according to the finding of the jury," etc.

If the jury fails to agree, costs are taxed, and another jury shall be summoned as before.

This is what may be appropriately designated as a civil case or proceeding; it is not a civil action according to the ordinary acceptation of that term. A civil action in the justice court prescribed by statute is analogous to the common law civil action, commenced in the same way, and attended with the same procedural incidents. In such actions the function of the justice and the jury are like those of a court of general jurisdiction.

This proceeding to try the right of property is not like the civil action; it is not commenced in the same way, no summons is issued to the parties. The claimant does not immediately commence the proceeding before the justice, this being done by the execution officer. Notice of the hearing by the party is given by the claimant.

The precise nature of the proceeding must be first determined in order to decide whether the remedy in mandamus is appropriate as well as whether the three-fourths jury law applies. It was treated as a statutory remedy, in *Patty v. Mansfield*, 8 Ohio, 369. And it was considered that the party was concluded or bound by it, so far as the officer is concerned. If he pursue this method and fail to establish this right, he may not be allowed in a subsequent proceeding against the officer to show his right to it. *Abbey v. Searls*, 4 Ohio St., 598; *Ralston v. Cursler*, 12 Ohio St., 105.

A justice of the peace is given jurisdiction in "criminal cases" as provided by statute, Section 13422, General Code.

An appeal can be taken in civil cases tried to a jury when more than \$20 is claimed (Section 10354, General Code). But no appeal can be allowed in trials of the right of property under the statute either levied upon by execution or attached (Section 10396, General Code).

An order made by a justice of the peace may be heard on error by the court of common pleas (Section 12241, General

Code). *Abbey v. Scarls*, 4 Ohio St., 598; *Jones v. Wilson*, 16 Ohio St., 420, are cases where error was prosecuted.

Section 10350, General Code, as amended 103 O. L., 13, provides that in all civil actions a jury shall render a verdict upon the concurrence of three-fourths or more of their number. Section 10350 is part of the chapter relating to "Trial, and its incidents" before justices of the peace.

Sections 11741-11743 are part of the civil code, and apply to cases of execution where the sheriff is executing the process. Sections 10371-10373 apply to executions made by the constables in justice's court. The fact that Sections 11741-11743 under which this proceeding was had is part of the civil code of procedure applicable to the common pleas court, and that there are separate sections applicable to justice's court demonstrates that it is to be regarded as a statutory proceeding in which power is conferred upon a justice of the peace to issue a summons, empanel a jury and enter judgment upon its verdict. It is not a civil action or civil case such as contemplated by Section 10350 of the justice's code wherein it is now provided that a three-fourths verdict may be rendered by a jury.

It must be concluded also that mandamus is not the appropriate remedy in view of the provision made that any order made by a justice of the peace may be reversed by the common pleas court. Section 12241, General Code.

The finding and judgment is against the relator and in favor of defendant.

1915.]

Stockwell v. Railway.

**AS TO THE ENFORCEMENT OF GRADE CROSSING
ELIMINATION AGREEMENTS.**

Common Pleas Court of Cuyahoga County.

JOHN N. STOCKWELL, DIRECTOR OF LAW OF THE CITY OF CLEVELAND, v. THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO.

Decided, September 17, 1915.

Grade Crossings—Invalidity of the Feature of the Act Which Attempts to Confer Judicial Power—Answer of Railway Company Alleging Inability to Comply With its Agreement—Held to be Good Against Demurrer—Section 8866.

1. The attempt, embodied in Section 8866 of the grade crossing act, to invest with the force and effect of a judicial decree an ordinance embodying an agreement between a municipality and a railway company relative to the elimination of grade crossings, is without constitutional warrant; but acting under this statute a court, upon being satisfied as to the action of council with reference to elimination of grade crossings and concurrence therein of the defendant railway company, may cause to be spread upon its journal a decree which shall have the effect of a judicial determination as to the execution of the agreement and its terms and conditions.
2. While a court is vested with wide power with reference to the enforcement of such agreements, an answer by the railway company, that owing to conditions developing subsequent to the agreement entered into between the company and the municipality it is unable to raise sufficient money to meet its share of the expense involved in such grade crossing eliminations, affords ground for the court to decline to take drastic action and is good against demurrer.

*John N. Stockwell, for plaintiff.**White, Johnson, Cannon & Neff, contra.*

NEWBY, J.; FORAN, J., concurs.

On May 6, 1915, John N. Stockwell, as director of law of the city of Cleveland, for and on behalf of said city, filed in this court, under and by virtue of Section 8866, General Code, an

application for an order enforcing the terms of an agreement to eliminate certain grade crossings, made and entered into by and between the city of Cleveland and the defendant, the New York, Chicago & St. Louis Railroad Company.

The application shows that the necessary legal preliminaries to eliminate certain grade crossings had been taken, and the necessary ordinances passed before the 21st day of August, 1914, on which day the defendant railroad company, through its duly authorized president, W. H. Canniff, accepted the conditions of the ordinance passed by the city of Cleveland to eliminate said grade crossings. Upon a hearing before Foran, J., presiding in room No. 1, it was held that the application for the issuance of a citation prayed for in the application filed, ordering the defendants to appear at a date certain and show cause why a final order as prayed for in the application filed, ordering the defendants to appear at a date certain and show cause why a final order as prayed for in said application should not issue, was refused.

It was ordered by the court that the application filed by John N. Stockwell should stand for and as a motion to enter of record, as an order and decree of this court, the ordinance and acceptance thereof by the defendant railroad company, filed with said application; and it was further ordered that the defendants file their answer to the said application before the 12th day of May, 1915, and that the application be set for hearing on the 18th day of May, 1915.

The answer was filed and the hearing had before the Honorable Cyrus Newby, Common Pleas Judge of Highland County, and M. A. Foran, judge of the Court of Common Pleas of Cuyahoga County.

The answer filed, in effect, admits that the agreement was made and entered into by the railroad company to eliminate the grade crossings specified in the application, and that the defendant had accepted the ordinance to eliminate said crossings; but the answer averred that, owing to conditions arising after such acceptance and making of said agreement, it was unable now to raise sufficient money to pay its proportion of the expense necessary to make said grade crossing elimination.

1915.]

Stockwell v. Railway.

A demurrer by way of objection to any testimony being introduced under this answer was interposed by the city of Cleveland, and the matter was heard upon said demurrer.

The filing in court of the resolution of council, with the railroad company's acceptance, did not give the contract created thereby the effect of a decree of this court, notwithstanding the provision of Section 8866 of the General Code that the filing should have that effect, for the reason that forming and issuing a decree of court is a judicial act—the exercise of judicial power. And since the Constitution has vested the judicial power of the state in the courts exclusively, it is not competent for the Legislature to grant the power to private individuals, to be exercised through some action of their own and without the intervention of a judicial officer, to make and issue a decree of court which the court and its officers must respect and enforce. The Legislature may properly provide for the performance by courts of judicial power in a summary manner, but can not take from the courts and lodge elsewhere their power to perform acts strictly judicial.

The most that can be claimed for this statute, Section 8866, General Code, is that it empowers the court, upon the filing of the resolution and acceptance, and upon being satisfied by proof that the resolution of council was duly passed and that the purported acceptance is genuine, to make and spread upon the journal a decree which shall have the effect of a judicial determination that the contract was entered into, and what the terms and conditions of the contract are. But whether the court will enforce the contract after its existence has been established by judicial decree, resort must be had to the rules which govern for the enforcement of contracts. And if the court determines upon the enforcement of the contract, a very wide power is given the court in the selection of the means of enforcement, even to the extent of enjoining the railroad company from running trains over the crossings involved.

The case was heard upon demurrer to the answer of the railroad company, and two questions are presented for determina-

tion; first, should the court by decree declare that the resolution was accepted, and that the resolution and acceptance thereof constitute a valid contract? And, second, does the answer show a good reason why the court should refuse to take summary action for the enforcement of the contract?

I am not prepared to disagree with counsel for the railroad company in their contention that some of the proceedings of the city council relating to the manner and method of constructing the crossings are fatally defective when questioned by property owners whose property may be affected by the omissions of council complained of; but these property holders may waive any objections they are entitled to interpose to the carrying forward of the improvement; and such right on their part to object should not be allowed to avail the railroad company, which is not affected by the defects complained of, as an excuse for avoiding their contract.

I can see no valid reason presented by the answer why the contract should not be established by decree of the court according to the terms and conditions set forth in the resolution of council and accepted by the company; but in my judgment the answer, if true, does present a reason why the court should not employ against the railroad company the drastic power granted by the statute. That is, if the railroad company, acting in good faith and with due diligence, is unable to secure the necessary funds to perform its part of the contract with the city, then the court should not use the extraordinary power granted by said section of the General Code for the reason that if the railroad company is without financial ability to perform, no order that the court can make, or at least ought to make, will supply that ability.

I consider the answer good as against a demurrer, and the demurrer should be overruled.

1915.]

Teepen v. Schlachter.

**INTEREST OF WIFE IN POLICY OF INSURANCE ON LIFE OF
HER HUSBAND MAY PASS BY WILL.**

Common Pleas Court of Hamilton County.

**AL. H. TEEPEN, ADMINISTRATOR, v. HENRY SCHLACHTER,
ADMINISTRATOR.***

Decided, January Term, 1915.

*Insurance on Life of Husband Made Payable to Wife—Vested Interest
of Wife Therein—Language of a Devise Sufficient to Cover the
Proceeds of Such a Policy.*

1. Where a policy of insurance is issued upon the life of a husband, the proceeds of which are payable unto his wife, her executors, administrators, or assigns, the said wife the moment the policy is issued obtains such a vested or devisable interest in the insurance fund prior to the death of her husband as she can pass by will.
2. Where the company issuing the policy promises to pay the proceeds thereof unto the wife, her executors, administrators and assigns, it is not such a policy payable to a married woman or to any person in trust for her or for her benefit as is contemplated in Section 9398, General Code; nor is it a policy made payable to a married woman solely for her own use as is contemplated in Section 9399, General Code; but, by its terms being payable to the wife or her assigns the wife's interest in it is assignable and therefore is capable of being devised.
3. A devise of "all my property both real and personal of which I may die seized to my husband * * * to him and his heirs forever" is sufficient to carry with it the proceeds of such a policy of insurance.

Clore & Clayton, for the demurrer.*Charles M. Leslie*, contra.

GEOGHEGAN, J.

Heard on demurrer to petition.

*Affirmed by the Court of Appeals, *Schlachter v. Teepen*, 23 C.C.(N. S.), —.

The petition recites that plaintiff is the duly appointed and qualified administrator of the estate of Herman Teepen, deceased, and that the defendant is the duly appointed and qualified administrator *de bonis non* with the will annexed of Mary Teepen, deceased; that on or about the 11th day of September, 1897, the Mutual Life Insurance Company of New York issued a certain policy of insurance on the life of the said Herman Teepen; that among the provisions of the policy was the following:

"In consideration of the application for a former policy numbered 663,849 and of the surrender of said former policy, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Mary Teepen, wife of Herman Teepen, of Cincinnati, in the county of Hamilton, state of Ohio, her executors, administrators or assigns, seventy-five hundred dollars, without profits, upon acceptance of satisfactory proofs at its home office, of the death of said Herman Teepen during the continuance of this policy, subject to the provisions stated on the back of this policy which are hereby referred to and made part hereof, and subject also to all claims and equities attaching to the ownership of said former policy.

"IN WITNESS WHEREOF, the said Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York, the eleventh day of September, A. D. one thousand eight hundred and ninety-seven."

The petition further recites that Mary Teepen, the above named beneficiary was the wife of Herman Teepen, deceased, and that said Mary Teepen died on or about the 11th day of April, 1898, leaving a last will and testament, and that said will provided among other things, as follows:

"Subject to the payment of my debts, should there be any, I give, devise and bequeath all my property, both real and personal of which I may die seized, to my husband, Herman Teepen, to him and his heirs forever."

That said Herman Teepen survived his wife and died on June 2, 1911.

1915.]

Teepen v. Schlachter.

Plaintiff claims that by the terms of the said will of said Mary Teepen, her interest in the life insurance policy passed to Herman Teepen, and that the proceeds of said policy which have been collected by the defendant as administrator, etc., of the said Mary Teepen, are payable to him as administrator of the said Herman Teepen, subject, however, to the payment of the debts of said Mary Teepen.

To this petition the defendant, as administrator, etc. of the said Mary Teepen, filed a demurrer, and it seems to be conceded by counsel in their briefs that the determination of plaintiff's right to this fund must rest upon the propositions, (a) whether the testatrix, Mary Teepen, had such a vested or devisable interest in the insurance fund prior to the death of her husband, as she could pass by will; (b) and whether it was the intention of said testatrix to devise this insurance fund to her husband.

As to the first proposition, I think it may be answered in the affirmative. It seems to be well settled that the moment a policy of insurance is issued, it and the money to become due under it, belongs to the person or persons named in it as beneficiary or beneficiaries. This rule is thus stated by Mr. Bliss in his work on Life Insurance, Second Edition, Sections 317 and 337:

“A policy of life insurance and the money to become due under it, belong the moment it is issued, to the person or persons named in it as beneficiary or beneficiaries and there is no power in the person procuring the insurance, by any act of his, by deed or by will to transfer to any other person the interest of the person or persons so named. The person designated in the policy is the proper person to receipt therefor, and to sue for the policy. *The principle is that the rights under the policy become vested immediately upon its being issued*, so that no person other than those designated can assign or surrender it and that in such assignment or surrender all persons must concur, or the interest of those not concurring is not affected.”

This rule seems to have been generally followed throughout the United States. A case very similar to the case at bar is the case of *Keller v. Gaylor*, 40 Conn., 343, wherein the facts were that:

"A testator had insured the life of his wife for his own benefit, with a provision that if he died before her the insurance money should be paid to their children. He died before her, leaving no children, and by his will gave her "all the residue of his estate, both real and personal, in whatever it might consist or wherever situated, to be hers without restraint and absolutely." *Held*: 1. That upon the death of the wife the insurance money became payable to his executor, as assets of his estate. 2. That the testator's interest in the policy passed to the wife in her life time by the residuary clause of the will, and after her death to her representatives."

The effect of the decision was, that the husband being the beneficiary of the policy of insurance, had such a vested interest in that policy that he might pass the same to his wife by his will, and that the policy was, upon her death, payable to her representatives. The court held that she became entitled to the policy of insurance as a chose in action belonging to him at his death.

In *Manhattan Life Insurance Co. v. Smith*, 44 Ohio St., 156, at page 163 the Supreme Court in speaking of a policy in which a wife was beneficiary, say:

"There was value in the policy, and at least to that extent the wife's right in it was a vested right. She was the beneficiary named in it, and upon both reason and authority we think it clear that no new contract or arrangement of any kind which affects the vested rights of the beneficiary in the policy can be made with the company alone by the insured."

This principle that a beneficiary in a policy of insurance has a vested right has been recognized in *Union Central Life Insurance Company v. Buxer*, 62 Ohio St., 385; *Bank v. Hume*, 128 U. S., 195; *Evans v. Opperman*, 76 Tex., 293; *Richter v. Charter Oak Insurance Co.*, 27 Minn., 193; *Harley, Admr., v. Heist*, 86 Ind., 196.

In *Glenn v. Burns* 100 Tennessee, 295 at 297, in the Supreme Court of Tennessee, the court quotes with approval the language of the Supreme Court of Connecticut in the case of *Continental Life Insurance Company v. Palmer et al*, 42 Conn., 60, as follows:

1915.]

Teepen v. Schlachter.

“The moment this policy was executed and delivered, it became property and the title to it vested in some one. It will not be claimed that it vested in the person whose life was insured. It must have vested then in all or in a part of the payees. The payees consist of two parties, the wife and the children. As only one could take and enjoy the property ultimately, it did not vest in all as tenants in common; nor did it vest in either so as to give a right to the present enjoyment of it. It was not, however, a mere expectancy, nor a naked possibility coupled with a present interest. It was visible, tangible property, and, like any other insurance policy, it was capable of assignment, and had an appreciable value. Each party took a conditional, not an absolute, right to the whole policy. It was not a condition precedent, but subsequent. * * * The right to the policy, in a strict sense, was not contingent; the possession and enjoyment of the fund thereby created were postponed to the future and were contingent. This contingency applied to both parties—to the wife as well as to the children. * * * In respect to each it was a then present right to the future enjoyment of property, but it was liable to be defeated by a subsequent contingency, and was certain to be defeated as to one of them. That *such a right is recognized as property, and is transmissible to heirs, is a proposition abundantly sustained by the authorities.*

It seems, therefore, clear that Mary Teepen, as soon as the policy on the life of Herman Teepen was issued, in which she was named as beneficiary, had a vested interest in the property, and having such vested interest in the property, she had the power to transmit that property by her last will and testament.

Counsel for defendant in arguing that there could not be a devise of a fund which would not come into existence until the death of the devisee, seems to have overlooked that it was not the *fund* which was attempted to be devised under the will, but *the right to have the fund*, and this being property, it passed like any other chattel to Herman Teepen, and upon his death, passed to his administrators.

It being clear that in the absence of a statute to the contrary Mary Teepen did have such a vested interest in the property as she could pass by will to any devisees, the only question that can be raised as to this right is such as is raised by counsel for de-

pendant with reference to the construction of Sections 9398 and 9399, General Code.

Section 9398 reads as follows:

“A policy of insurance on the life of any person duly assigned, transferred, or made payable to a married woman, or to any person in trust for her or for her benefit, whether such transfer is made by her husband or other person, shall inure to her benefit, and that of her children, independently of her husband or his creditors, or of the person effecting or transferring the policy or his creditors.”

Section 9399 reads as follows:

“The amount of the insurance so provided for in the preceding sections, may be made payable, in case of death of the wife before the period at which it becomes due, to his, her, or their children, for their use, as provided in the policy of insurance, or to their guardian, if under age. If there are no children, upon the death of the wife, such policy shall revert to and become the property of the party whose life is insured, unless it has been transferred as hereinafter provided. When by its terms, or a transfer thereof, a policy is payable to a married woman solely for her own use, she may sell, assign, or surrender it, but the party whose life is insured, shall concur in and become a party to the transfer.”

This act is first found in section 30 of an act to regulate insurance companies doing business in the State of Ohio, passed April 27, 1872 (69 Ohio Laws, 140). It was amended by an act passed June 12, 1879 (76 O. L., 160) wherein is the provision, that a policy payable to a married woman solely for her own use, may be sold assigned, or surrendered by her provided the insured shall concur and become a party to the transaction, was incorporated in the act.

It will be observed that these acts were passed prior to the passage of the Married Womens Enabling Acts, and their evident purpose was to secure to a married woman the benefits of policies of insurance made payable to her, without hindrance or molestation from the husband's creditors. It is evident that the Legislature, in passing these acts, recognized that a wife had a

1915.]

Teepen v. Schlachter.

vested interest in a policy of insurance made payable to her, no matter whether the policy was on the life of her husband or that of some other person, and it sought to frustrate, and did frustrate by this act, any attempt on the part of the husband's creditors to work out their rights through his right to reduce her choses in action to possession, so that the proceeds thereof might be applied to the payment of their claims.

However, it will be observed that this policy of insurance is not such a policy as is described in these two sections. The policy reads: "Promises to pay * * * unto Mary Teepen, wife of Herman Teepen, * * * *her executors, administrators, or assigns.*" It is not a policy payable to a married woman, simply, or to any person in trust for her, or for her benefit, as provided in Section 9398, General Code, nor is it a policy made payable to a married woman solely for her own use, as provided in Section 9399. This policy is, by its terms, payable to Mary Teepen, her executors, administrators or assigns, and, therefore, being payable to her assigns, her interest in it was assignable, and if assignable was capable of being devised.

This construction is in line with the construction given by Judge Smith in the Superior Court of Cincinnati in General Term, in the case of *Reakirt v. Besuden et al*, 3 N.P.(N.S.), 646; affirmed 73 Ohio St., 383; wherein, in construing a policy of similar import, Judge Smith says, at page 651:

"It seems to me that this statute has no application to the case at bar for the reason that both provisions of the statute above referred to have reference only to a case where a policy of insurance is transferred absolutely to a married woman. In such a case the transfer inures to the benefit of her children, and she can not assign it without their consent unless in the language of the statute it is transferred to her 'solely for her use.'"

The transfer of the policy Judge Smith was construing read; "Unto Annette R. Besuden and assigns." And the majority of the court, while reaching the same conclusion, did so by a different method of reasoning, holding that the assignment of a policy of insurance to a wife and her assigns creates an es-

tate solely for her own use, and that under the second clause of the statute, now a separate statute under the code (Section 9399), she might transfer and assign her interest with the consent of her husband.

Even if we apply this method of reasoning to the case at bar, it will be seen that the devise by Mary Teepen of all her property, would pass her vested interest in this policy of insurance to her husband, Herman Teepen, and while it is true the statute provides that the party whose life is insured shall concur in and become a party to the transfer, nevertheless, where the husband is the party whose life is insured and he is also the transferee or devisee of the wife's interest in the policy, it would be a vain thing to require him to consent in writing to the transfer to himself. The only purpose and object of this provision is to prevent a wife from transferring her property in a policy of life insurance without the consent of the person whose life is insured, and can have no application where the transfer is attempted to be made to the person himself whose life is insured. However, I am inclined to think that the reasoning of Judge Smith in construing these questions is more in accord with the evident legislative purpose in enacting these statutes, which purpose was to give a means to a married man to protect his wife and his children by insuring his life without interference of his creditors at a time when the said creditors could interfere by working out their rights through his common law rights in his wife's personal property.

But one further question now remains. Was it the intention of said Mary Teepen to pass this policy of insurance to her husband, Herman Teepen, under her will? She makes him the general residuary devisee of all her property without condition or qualification, except as to the payment of her debts. It must therefore be assumed that she intended to pass all of her property under this will. As this policy at the time it was issued became vested in her, we must assume that she intended to include this. There is nothing in the will itself, in so far as it has been presented to the court, in the petition or in the argu-

1915.]

Teepen v. Schlachter.

ment of counsel, that would tend to show that she intended to exclude this policy of insurance from the terms of the will.

In *Townsend's Executors v. Townsend et al*, 25 Ohio St., 477, the Supreme Court has laid down certain rules of construction of wills which have been followed without exception and have not been deviated from, and among these rules is found the rule, that the intention of the testator must be ascertained from the words contained in the will. And the rule seems to be that where there is no ambiguity in the express provisions of the will, it must be assumed that the testator intended precisely what the will says, and that therefore under this will passing all her property to Herman Teepen, it must be assumed that the testatrix, Mary Teepen, had in mind her interest in this policy of insurance and that she intended to pass it along with all her other property to the said Herman Teepen.

This construction seems to be in accord with the rules laid down in *Charch v. Charch*, 57 Ohio St., 561; *Robbins v. Smith*, 5 C.C.(N.S.), 545; *Youngblood v. Youngblood*, 11 C.C.(N.S.), 279. It is certainly precisely in accord with the rule of the Supreme Court of Connecticut in the very similar case of *Keller v. Gaylor*, *supra*.

Two minor questions remain: first, the petition does not aver that the debts of the estate of Mary Teepen have been paid; secondly, the petition does not aver that Herman Teepen elected to take under the will of Mary Teepen.

Counsel for plaintiff in his oral argument, as well as in his brief, asserts that the debts are paid, and that Herman Teepen did elect, and expresses his willingness, if the court thinks it necessary to do so, to incorporate these allegations in his petition. The question therefore as to this part becomes moot, and both counsel for plaintiff and defendant argue the case in the main as if these allegations were in the petition, as well as the allegation that the said Mary Teepen left two children.

The allegations as to the payment of debts and the election under the will would be proper allegations in this petition, and the court thinks they should be incorporated. Therefore, leave

Biddinger v. Steininger-Taylor Co. [Vol. 18 (N.S.)]

will be granted to amend the petition in these particulars, and, assuming that the petition is amended in these particulars, the demurrer will be overruled.

**RECEIPT OF INDUSTRIAL INSURANCE NOT A BAR TO AN
ACTION FOR DAMAGES AGAINST A
STRANGER.**

Common Pleas Court of Hardin County.

BIDDINGER, ADMINISTRATOR, v. STEININGER-TAYLOR COMPANY.

Decided, 1915.

Workmen's Compensation—Award of, Not a Bar to an Action for Damages—Against a Stranger Negligently Causing the Injury.

An employee who has been injured or the personal representative of an employee who has been killed in the course of his employment, after having applied for and received an award under the workmen's compensation law, and after such award has been paid in full, may maintain an action against a stranger for damages for negligently causing the same personal injury.

Demurrer.

Plaintiff, instituting this action as administratrix of one Alta Biddinger, deceased, in behalf of herself as his widow and his two dependent children, complains in her petition that while her said husband was employed by the Champion Iron Company and engaged in certain work for said employer about the construction of the courthouse building at Kenton, he was injured and killed by certain negligent acts and omissions of defendant, for which she seeks to recover damages in the sum of \$15,000.

Defendant has answered this petition, and the second defense in its amended answer reads as follows:

“Second Defense. Defendant for its second defense avers, that on or about April 20, A. D. 1914, Mary L. Biddinger, the plaintiff herein, for herself as the widow of Alta Biddinger, deceased, and on behalf of Catherine Mary Biddinger and Harry E. Newcomb, as the dependents of said Alta Biddinger, de-

1915.]

Biddinger v. Steininger-Taylor Co.

ceased, by their attorney, filed an application before the Industrial Commission of Ohio, in the city of Columbus, Ohio, and asked said commission to determine what compensation, as such dependents, should be allowed to them by reason of the death of said Alta Biddinger while in the course of his employment, as provided by Section 27 of the workmen's compensation act.

"That said industrial commission of Ohio, on the hearing of said application awarded and allowed to the said dependents, Mary L. Biddinger, Catherine Mary Biddinger and Harry E. Newcomb, the sum of \$2,633.25. That said sum was duly paid to plaintiff, for the joint use of herself, Catherine Mary Biddinger and Harry E. Newcomb, share and share alike, and the same was accepted by her.

"That the said plaintiff, Mary L. Biddinger, is the widow of said Alta Biddinger, deceased, and said Catherine Mary Biddinger is the only child and heir at law of said Alta Biddinger, deceased, and said Harry E. Newcomb is his stepson.

"Defendant avers that the plaintiff, by making said application as aforesaid, to the industrial commission of Ohio, as one of the dependents of said Alta Biddinger, deceased, waived her right to institute this suit; that plaintiff is thereby barred and stopped from asserting any claims for damages against this defendant, and that said compensation received, as aforesaid, is a complete bar to any further recovery of any sum for the death of said Alta Biddinger, deceased.

"Defendant further avers that it is now and was at the time mentioned in plaintiff's petition, to-wit, April 10, 1914, and prior thereto, a subscriber to the state insurance fund provided for in an act creating said liability board of awards (now the Industrial Commission of Ohio) and is entitled to the protection and benefits afforded by said act."

Plaintiff has demurred to this second defense, and its said demurrer, having been argued and submitted, presents the questions of law now before the court for solution.

Henderson & Durbin, for plaintiff.

Mahon & Mahon, contra.

HENDERSON, J.

Naturally, by reason of the short period of time during which workmen's compensation laws have been in operation, precedent

affords little in the way of first aid to the case stated; the converse of the case has been decided by the Essex county court of common pleas of New Jersey, *Perlsburg v. Muller*, 35 N. J. Law Jo., 202, and by the Industrial Commission of Ohio, *Ridorfo v. Telephone Co.*, No. 3139; in both of these cases it was held that an injured employee, after accepting settlement for his claim for damages from a stranger wrongdoer might still successfully prosecute a claim against his employer for compensation for the same injury.

Aside from these decisions and the light they may afford the court is remitted, for a solution of the case stated, to a consideration of the language of the workmen's compensation law, of the reasons for its enactment and of the nature of the relief or compensation awarded by it, together with a consideration of the familiar action at law for damages for personal injuries and the nature of the remedy it gave.

The action at law for damages for personal injuries existed under the common law of England; originally it is probable that its remedy was given entirely independent of any fault or breach of duty on the part of the defendant, being based on the rude principle of justice coeval with the beginnings of civil society—"An eye for an eye and a tooth for a tooth;" at a period in the development of the common law antedating its adoption in this country, however, an award of damages in this action (with some particular exceptions) came to be based and dependent on some tort delict or breach of duty on the part of defendant, in short, upon defendant's negligence, as we commonly understand and state it, or upon his wilful tort.

Confining our attention to that class alone of actions of trespass wherein defendant's negligence was the determining element of his liability, and still further restricting ourselves to the subclass which concerns itself with actions by employee against employer for damages for personal injuries suffered by the former in the course of his employment, the damages given (except in cases of wrongful death wherein under statutes a different rule was laid down) were intended to be a full equivalent for the injuries suffered, as well as money could measure such injuries;

1915.]

Biddinger v. Steininger-Taylor Co.

accordingly, juries were told to take into account not only physicians', surgeons' and nurses' bills for care, skill and attention, loss of time and diminished earning capacity of the injured employee himself, but such uncertain and speculative elements as his physical pain, distress and anguish, probability of a shortened life, loss of limb, eye or other organ, any maiming or bodily deformity, impairment of usual faculties, physical or mental; consideration of such elements of damages was logically necessary in attempting to measure out full compensation, but it deprived a verdict in any given case of every element of certainty and substituted instead a speculation wherein sympathy, prejudice and sentiment might play the leading part.

As this common law method came to be tested by the needs of modern industrial society, its inefficiency became, year by year, more apparent. The protracted litigation to which it gave rise, with its attendant high expense, the uncertainty of the final outcome and the temptation to gamble on the amount of recovery, were vexatious and unjust to employee and employer alike; it became a scandal in the legal profession, a reflection upon the court and a burden and blemish upon the civil state; hence the recent substitute for it—the compulsory employee's compensation law.

In construing the extent and meaning of a statute amendatory of the common law, Blackstone suggests three points of consideration of cardinal importance, to-wit: The old law, the mischief and the remedy. The old law and the mischief have just been rapidly and superficially sketched: as to the remedy, the new law gives the employee a certain right to fixed compensation, and takes away, in great measure, his uncertain right to indefinite damages, at the same time imposing upon the employer a certain liability to pay a fixed annual premium and relieving him of an uncertain liability for indefinite damages; it renders protracted litigation, or litigation at all, unnecessary, and the high expense formerly incident thereto, impossible; the nature of the relief given is different; instead of attempting to estimate a full equivalent in damages for the injury, once for all, which must necessarily involve the varying and speculative elements

above alluded to, it makes no attempt to measure pain, distress of body and mind, the loss of an eye or limb, etc., in dollars, but awards, instead by rules fixed in advance for all cases, a stated periodical payment, based on the employee's former wages and the probable disabling effects of his injuries.

In framing and passing this law, the Legislature had in mind problems growing out of the relation of employee and employer alone; it modified and in great measure took away from the former his right to sue the latter at law for personal injuries received in the course of employment; but in the general situation itself, there is nothing to warrant a belief that it was considering or intending to take from a citizen his right at common law to hold strangers accountable for failing to use ordinary care toward him; still less that it was aiming to render negligence safe and immune from liability, provided only that it be indulged in by one citizen, not toward his employee but toward a workman engaged in the employment of another.

The language and terms of the new law are next to be examined. A right of action previously existing is not to be deemed taken away by a new law unless done in express terms or by an implication which seems unavoidable; it is not claimed that the express terms of the new law takes away any previously existing right of action from a workman, except those subsisting between himself and his employer and arising out of the relation of such employment.

The express language of Section 25 limits the waiver therein referred to, to rights of action against the employer; the first sentence of the second paragraph of Section 29 is not so explicit; but the context, particularly the following sentence and the preceding paragraph, makes it very plain that the option referred to in the first sentence of the second paragraph, is the same option described in the first paragraph, *i. e.*, an option to apply for an award under the act or to sue the employer in the courts.

It is finally contended that plaintiff's receipt of an award under the workmen's compensation law operated as a satisfaction of the injury complained of by her in her petition; that

1915.]

Biddinger v. Steininger-Taylor Co.

the injury, having thus been satisfied, no longer survives to support an action and that it is immaterial, so far as the legal effect of a satisfaction for a tortious injury is concerned, whence or from whom the satisfaction comes. *Miller v. Beck*, 108 Iowa, 575.

This leads to inquiry into the nature of the compensation given under the new law; in its essential legal nature, is it the same as the damages formerly awarded, though awarded by a different tribunal, and upon different procedure; or is it something essentially different, which the law has created as a substitute, compulsory in large measure upon employer and employee alike, for the damages formerly awarded by juries in the courts of law?

As already noted, the compensation given under the new law is fixed or measured by a standard entirely different from the measure of damages in actions at law; the compensation does not profess to be a full equivalent for the injuries, as the damages heretofore given in such cases were designed to be; under the old system, each case stood by itself, so far as the *quantum* of damages was concerned; under the new system, compensation is fixed in advance for all cases by classes, similar to the methods prescribed in policies of accident insurance. The new law in its terms preserves the distinction between compensation under it and damages, Sections 29, 45; and Section 45 shows a consciousness on the part of the Legislature that compensation was to be regarded as radically different from damages, both in the elements of which it is made up and in the reason for which it is awarded.

The terminology of the new law has no relation to a damage claim; it rather reads like the regulations of an accident insurance company.

Section 25 shows that compensation is not awarded upon any theory of satisfaction for legal injury suffered; for compensation, by the terms of Section 25, is to be given without distinction (a) to a workman injured by the employer's negligence, as we have heretofore understood the term; (b) to a workman injured by no fault or carelessness of the employer, such as avoid-

able accident, etc.; and (c) to a workman injured solely by his own fault and carelessness; the presence of this last class of beneficiaries sufficiently shows that the compensation is not based upon any possible theory of satisfaction for a tort.

The whole system is a system of compulsory state industrial insurance, a system of pensions for disabilities received in the field of industrial employment. The injured workman is the beneficiary, employers must furnish the funds out of which compensation is paid; as we have seen, this compensation can not be considered a satisfaction of a legal injury suffered upon any *ex delicto* theory. Whether the obligation under which the employer rests to pay the compensation, either directly as an award or indirectly as premium is an obligation *ex contractu*, *quasi* contract, or statutory, is not material to the present inquiry.

As the court regards it, the essential nature of the right of the employee and of the obligation of the employer is the same, whether the employer pays his premium to the state industrial commission under the first paragraph of Section 22, whether the employer elects to pay compensation directly to his employees under the second paragraph of Section 22, or whether the employer is obliged to pay the award made by the state industrial commission under Section 27, as in the case at bar. Neither is it regarded as material that defendant protected itself from liability for injury to its own employees, by contribution to the state fund.

Demurrer to second defense of amended answer sustained.

1915.]

Mog v. Cleveland.

COMPETITIVE BIDDING FOR MUNICIPAL SUPPLIES.

Common Pleas Court of Cuyahoga County.

GEORGE J. MOG AND THERESA A. MOG V. THE CITY OF
CLEVELAND ET AL.

Decided, June 11, 1915.

Municipal Corporations—Principle of Competitive Bidding Must be Held Inviolable—And Has Been Carried Into the Cleveland Charter—Specifications Inadmissible Which Are so Drawn as to Admit of Goods Manufactured by Only One Concern—Injunction.

1. The principle of competitive bidding in the purchase of supplies is of such importance to the well being of a municipality, and is so imbedded in the law of the state, that reason for departing therefrom in a particular instance is not afforded by the fact that some inconvenience or loss will be incurred by adherence thereto.
2. This principle has been incorporated into the new charter of the city of Cleveland, granting powers of local self-government; and, under said charter, the adoption of plans and specifications for a public improvement which restrains free competitive bidding by requiring the exclusive use of any article which is controlled by a single person, firm or corporation, is prohibited.
3. Where it is shown by the testimony of the officers having the matter in hand that in their opinion the desired equipment can not be secured through competition, but must be purchased from a particular manufacturer, and it is frankly admitted that the specifications were so drawn as to make it impractical for any other manufacturer to submit a bid, injunction will lie against acceptance of the proposal of the one manufacturer whose product corresponds with the specifications upon which bids were asked.

White, Johnson, Cannon & Neff, for plaintiffs.

Hoyt, Dustin, Kelley, McKeehan & Andrews and City Solicitors, contra.

FORAN, J.

The plaintiffs, George J. Mog and Theresa A. Mog, as taxpayers and residents of the city of Cleveland, filed a petition

in this court May 13, 1915, in behalf of the city and all taxpayers thereof, against the city of Cleveland, Charles W. Stage, director of public utilities, and the Babcock & Wilcox Company, a New Jersey corporation, praying that they be enjoined from doing certain things complained of in the petition.

It is alleged in the petition that the city of Cleveland has in process of construction a filtration plant on Division avenue, and in connection therewith is about to install a pumping station, for which it became necessary to purchase five steam boilers which the city determined should be water tube boilers; and that the specifications prepared by the defendant municipality and the defendant, Charles W. Stage, its director of public utilities, for said boilers were so drawn as to confine all possibility of competition to the defendants, the Babcock & Wilcox Company; and in fact were specifications exclusively for said company; and that the advertisement and specifications sent to other competitors or manufacturers of steam boilers purporting to afford or give opportunity for competition were so in form only—a mere pretense and idle ceremony; for it is claimed that under the specifications the Babcock & Wilcox Company alone could commercially conform to the specifications as drawn and prepared. In fact it is broadly stated and claimed that the specifications in fact and in effect called for and prescribed a type of boiler made or manufactured only by the Babcock & Wilcox Company.

It is further claimed in the petition, and was strenuously insisted upon during the hearing, that the Babcock & Wilcox Company being especially equipped to manufacture the types of steam boilers prescribed and named in the specifications, other manufacturers of steam boilers could not successfully compete with said company, and declined to submit bids, and that the bid of the Babcock & Wilcox Company of \$43,000 was the only bid submitted and that the board of control of the city of Cleveland has approved, this bid and is about to enter into and execute a contract with the said Babcock & Wilcox Company for said steam boilers.

1915.]

Mog v. Cleveland.

The prayer of the petition is, that the defendants, the city of Cleveland and Charles W. Stage, as director of public utilities, be enjoined from executing said contract, and that the Babcock & Wilcox Company be enjoined from doing any act under or by virtue of said contract.

The joint answer of the city of Cleveland and Charles W. Stage, director of public utilities, admits the city of Cleveland has adopted a charter as alleged in the petition; that the city has in process of construction a filtration plant, for which five water tube boilers are necessary, and that by the city's specifications therefor it was provided that bids would be received only on water-tube boilers having tubes directly connected with steam drums or with boilers having tubes expanded into sectional headers which connect with water and steam drums. But it is averred that these stipulations permitted the widest and freest competition. It is admitted that the Babcock & Wilcox Company is a manufacturer of the two types of boilers mentioned in the petition and provided for in the specifications of the city; but it is insisted that the same are obtainable in a wide market in forms differing, as made by the various manufacturers thereof, in workmanship, material, efficiency, facility and economy of operation.

The city further avers that it is informed by the Babcock & Wilcox Company that certain patents on its said boilers have expired. It is admitted that the board of control of the city of Cleveland has accepted the bid of said Babcock & Wilcox Company and awarded said company the contract, and that said contract will be executed and carried into effect unless the same is prevented by this court. Further answering, the city and the said Stage deny each and every other allegation in the petition.

The answer of the Babcock & Wilcox Company, except for the necessary details to make the answer applicable to that company, is practically identical with the answer of the city of Cleveland and Charles W. Stage, director of public utilities.

There are allegations in the petition to the effect that the city of Cleveland has adopted a charter, and that this charter

provides that in making purchases above one thousand dollars, the same shall be made by competitive bidding or after proposals have been received through competitive bidding.

Sections of the charter in relation to competitive bidding and the ordinances of the city passed thereunder will be referred to hereafter.

To better understand the questions involved, a few general observations on steam boilers may not be inappropriate.

A steam boiler is simply an appliance whereby potential energy of the fuel used is converted into a force or energy through or by which mechanical work is performed by means of a steam engine. Its essentials are a receptacle containing the water and the steam produced by evaporation, a furnace for burning the fuel, and a sufficient heating surface to evaporate the water and produce the steam required for any given installation.

The efficiency of the boiler depends upon many considerations, one witness declaring that as many as twenty-five or more essentials or conditions should be taken into account in order to secure the highest efficiency. These we think can be reduced to four or five; at least all the conditions may be included in that number.

High efficiency simply means the largest amount of steam that can be produced in proportion to the amount of fuel consumed, and for such efficiency "completeness of combustion of fuel must be combined with sufficient heat surface to absorb so much of the heat produced as will reduce the temperature of the funnel gases to nearly that of steam." To attain this end the amount of air admitted to the furnace is quite important, it being generally conceded that much more air must be admitted than is theoretically necessary to oxidize the combustible portions of the fuel; and this again depends upon the kind and character of the coal or other fuel used. Then, again, much depends upon the draft, natural or forced, and the mechanical stoking employed.

Boilers may be divided into two distinct classes or types, the tank and the water tube. With the former we are not concerned,

1915.]

Mog v. Cleveland.

except to say that in this class the water surrounds the fire or hot gases, while in the tube boiler the fire or hot gases surround the water.

There are many types or classes of water tube boilers, all of which it is claimed develop high efficiency, each maker contending that the type or class made by him is unqualifiedly the best. We will only refer to three of these types, and necessarily in the briefest manner, because we think the other types are practically excluded by the specifications.

The Babcock & Wilcox boiler is a well-known and largely used boiler, capable of high efficiency, and of acknowledged serviceability. It "consists of a horizontal cylinder forming a steam chest, having dished ends and two specially constructed cross boxes, riveted to the bottom. Under the cylinder is placed a sloping nest of tubes, under the upper end of which is the fire. The sides and back of the boiler are enclosed in brick work up to the height of the center of the horizontal cylinder, and the front is fitted into an iron casing lined with brick at the lower part. Suitable brick work baffles are arranged between the tubes themselves, and between the nests of tubes and the cylinder, to insure a proper circulation of the products of combustion which are made to pass between the tubes three times. The nest of tubes consists of several separate elements, each formed by a front and back header made of wrought or forged steel of sinuous form connected by a number of tubes."

There are many other details, including water feed and appliances for superheating the steam, and more of minor importance.

It is claimed that any desired working pressure can be provided for in these boilers, rising in some special cases as high as five hundred pounds per square inch, but the more usual pressure is one hundred and eighty pounds. This is known as the sectional header type of boiler. In some of these types the sectional header is not sinuous.

The Sterling type "consists of four horizontal drums, of which the three upper form the steam and water space, the lower con-

taining water alone. The lower drum is fitted to the upper drums by numerous nearly vertical tubes, which form the major portion of the heating surfaces. The central upper drum is at a slightly higher level than the others, and communicates with that nearest the back of the boiler by a set of curved tubes entirely above the water level, and with the front drum by two sets—the upper one being above and the lower below the water level. The whole boiler is enclosed in brick work, into which the supporting columns and girders are built. Brick work baffles, four in number, compel the furnace gases to take specified courses among the tubes.”

There are many other details, including arrangements for super-heating and water feed, which do not demand special attention or mention, as all makes or types include such details.

In this boiler five drums may be used, two at the bottom suitably connected, and three at the top, as above indicated.

This boiler, it is and must be admitted, is capable of high efficiency, is in general use, and has given uniform satisfaction. Both these classes or types were patented, but it is said the patents have expired. It is admitted the patents have expired on the boilers as originally placed upon the market or used in the trade, but it is insisted by the plaintiff that patents have been applied for for improvements on the Sterling boiler, the claim being confined, however, to the baffling arrangement.

The Badenhausen type of boiler is patented, and as it has been upon the market but a few years, an impartial description of its details by impersonal authors and writers on steam and boilers is not available. As described by the patentee, it “consists of two water drums and two steam drums. The two water drums and the rear steam and water drum are connected by means of tubes, so as to form a perfect cycle of circulation for the water. The steam drum is connected through the water column opening to the lower front drum. The boiler is supported by heavy steel framing, which consists of I-beams, in which case the rear steam and water drum rests upon horizontal I-beams. The water drum is suspended from heavy turned bolts

1915.]

Mog v. Cleveland.

secured to these I-beams, and the mud drum is suspended from the tubes which are connected to the rear steam and water drums. The front water drum is supported from the frame by means of bolts. The mud drum is suspended from the tubes, giving, as the patentee claims, perfect flexibility, so that whatever the variations of temperature may be in the boiler, there is no liability of tubes being distorted or torn out from the drum."

Of course, there are many other details, including water feed, super-heating and brick work man-holes, character of structure, and material used.

Many claims are made for this boiler, the principal claims being that it has "the most perfect type of circulation." In a word, that the circulation is positive, continuous and unrestricted. It is also claimed that it has more disengaging surface; that is, more total area of tubes discharging into the rear drum; that it has greater flexibility than other boilers, and that the steam while passing through the steam tubes is more thoroughly dried and super-heated, and thus the difficulties contingent upon using saturated steam avoided.

There is, or can be no doubt but that superheated or dry steam is an essential factor in the efficiency of boilers. Any vapor in contact with the liquid from which it is formed, if both are in thermal equilibrium, is necessarily saturated, and in this condition it is not a perfect gas. The more steam is superheated the more nearly its properties approach those of a perfect gas, the greater its volume as compared with water, and the more pressure it exerts; and besides the evils contingent upon carrying water into the engine's cylinders is wholly obviated. If a steam engine is considered as a thermo-dynamic appliance whose function is to secure the greatest possible amount of work from a given quantity of fuel or heat, it will be seen that superheated steam is of prime importance. The Badenhausen people make large claims in this respect, as well as in other respects; but even if we should largely discount all the claims made for the Badenhausen boiler, we think the testimony fairly if not conclusively demonstrates that it is just as good a boiler and capable of as

high efficiency as either the Babcock & Wilcox sectional sinuous header or the Sterling type of boiler. Indeed, if the testimony is to be believed, it is quite probable that in some respects it is superior to these types. Many firms manufacture what is known as the solid header type, which it is claimed is just as efficient as the sectional header type. It is frankly admitted by the defendant municipality that this type (solid header) is excluded by its specifications.

It is not essential or necessary to the inquiry before us or the questions under consideration to hold that this type was improperly excluded from competition. During the hearing this type was loosely termed a water leg boiler. A water leg is a vertical water space connecting other water spaces and crossing a flue space by which its contents are heated. It must be conceded that the tube to drum and the sectional sinuous header types are steps in advance of the water leg, especially in installations where as high as 500 prime mover units are required; and we think the city was justified in excluding that type; but if the makers of these types could manufacture the types called for by the specifications, there is certainly no reason why they should not be given full and free opportunity to do so.

Clause 5 of the specifications reads:

“Bids will be received only on water tube boilers having tubes direct connected with water and steam drums or with boilers having tubes expanded into sectional headers which connect with water and steam drums.”

It will be seen at a glance that this paragraph excludes all types of boilers except the tube to drum and the sectional header types.

It is not claimed by the plaintiff that the municipality had no right to specify these types, provided the principle of competition was not invaded by restrictions as to the time within which proposals would be received, except in so far as it is claimed that by specifying the type of boiler which has been made or manufactured by one firm exclusively, other firms or competitors

1915.]

Mog v. Cleveland.

necessarily are at a disadvantage in endeavoring to compete with such firm on its special type of boiler. The specifications were mailed on April 1, 1915, to some seventeen different makers of boilers. By clause 1 it is provided that sealed proposals "will be received at the office of the commissioner of purchases and supplies, 511 City Hall, until 12 o'clock m. April 15, 1915, and will be opened immediately thereafter.

Clauses 8, 9 and 10 provide substantially as follows:

"Each proposal must be accompanied by plans drawn accurately to scale, showing the complete assemblage of the boilers required and equipped with mechanical stokers and the necessary brick work."

It is further provided that the plans shall include side and front elevation, longitudinal and cross sections through one boiler showing superheater, stoker, brick work, baffling, and specify all tubes. Indeed, it may be said in a general way that the plans and drawings submitted with each proposal must contain all the data necessary to enable the board of control or the commissioner of water to determine whether the proposal corresponds accurately to every possible part of the specifications.

It will be noticed that only fourteen days are given in which to prepare all these plans, blueprints, drawings and data. If it is true, as claimed by the plaintiff, that the types selected or specified are only made by the Babcock & Wilcox Company, it need hardly be said that that company had an advantage over all other competitors so far as furnishing these drawings, blueprints, plans and data is concerned. It appears in evidence, and is not denied, that this company is the largest and no doubt the best equipped manufacturer of steam boilers in the United States. It supplies a very large part of the trade, makes over eight hundred classes, types and sizes of boilers, and has on hand drawings, plans and blueprints for any kind, type or size of boiler for any installation heretofore known. It strenuously insisted, and not seriously controverted, that no maker of boilers but the Babcock & Wilcox Company could furnish the drawings,

plans and data demanded by clauses 8, 9 and 10 in fourteen days after the specifications were received; and if the specifications had to be mailed to far distant localities, the time might be less than twelve days, or even less, excluding Sunday. In this connection it must be remembered that the boiler business, like all other kinds of manufacturing, is more or less affected by the general tendency to specialize along certain lines. The growth and improvement in machine tools and diminished hand work must be considered. Every distinct operation on almost every section of a boiler may be accomplished by a highly specialized machine and repetitive operations superseded by templating, which has reached such a state of perfection that the evils of drifting are no longer dreaded by either the manufacturer or the purchaser of boilers. It is in evidence that one machine to make sectional sinuous headers costs the Babcock & Wilcox Company \$250,000. This must necessarily be a highly specialized and very complicated machine. If a thousand boilers are made in a year, each plate, hole and flange will be alike in each. The dimensions of plates, tubes and drums for any kind or size of boiler will not only be known, but the parts will also be kept in stock and ready to be assembled. It is for this reason that competition is endangered when designs or types and not results are specified. These designs and types divide themselves into classes adapted to almost any particular kind of installment, not only as to the number of prime mover units to be provided for, but also the space and character of the location where the installation is to be made. This becomes quite evident from the fact that the proposal of the Babcock & Wilcox Company, which was accepted by the board of control, provides for what is known as Class O No. 20 type of Sterling boiler. This is undoubtedly a standard type made by this company, and no new drawings or specifications were required. Therefore and for that reason it will be readily seen how difficult it would be for any other company to compete with the Babcock & Wilcox Company in designing a Class O No. 20 standard type of Sterling boiler. It may be said, however, that results are required of or from the design

1915.]

Mog v. Cleveland.

or type specified, but the evil arises from practically excluding results guaranteed by the makers of other designs or types.

While it is admitted that any properly equipped boiler shop may make any type of boiler that may be designed, it must be conceded that no man can commercially compete with another man on the type of boiler in the building of which the latter has specialized for a number of years, and for the reason that his machinery and templeting may be specially adapted and his workmen specially skilled or trained to produce that type of boiler. It may be said that the man who has so specialized, because of such specialization and the necessary equipment therefor, can sell his product or type at a lower price than the man who attempts to compete with him in his particular line. This is in a measure true, but the danger, however, is that, after he has obtained control of the market, he can fix the price to suit himself, as he is then no longer subject to competition, and the purchaser necessarily suffers. But there is a still greater danger to be apprehended from specifying types and designs. It in effect limits bidding to the man or corporation whose type or design is selected or specified; for, being peculiarly equipped to make the type called for, he is in such a position of advantage that others, knowing they can not commercially compete on the type specified, refrain from or refuse to bid or submit proposals, and thus the maker of the type specified has the field to himself, and naturally secures a higher price than he would if competition were possible. This becomes quite evident from the testimony in this case. The Babcock & Wilcox Company was the only firm that submitted proposals, and it is in evidence, and not denied, that one boiler manufacturer informed the board of control that if he were given an opportunity to bid, he could save the city ten thousand dollars.

Again, it is provided by clause 23 of the specifications that:

“In comparing the proposals submitted, that offering to complete the work in the shortest time will be taken as the standard, and an amount equal to fifty dollars multiplied by the number of days that each other bid is in excess of the time adopted as stand-

ard, will be added to the price stated in said bid to determine which is the lowest and best proposal."

This simply means that if one firm offers to have the boilers ready and installed in fifty days, and another in one hundred days, there will be added to the bid of the latter the sum of \$2,500; that is, \$50 a day for the difference between his bid and the bid of the person offering to have the boiler installed in fifty days. Where competition is sharp, the sum of \$2,500 is quite an item. It is no answer to this to say that the proposal submitted for the Division avenue pumping station was to have the installation complete within three days of the time specified, and this time was four months; for it is in evidence that on an installation for the Fairmount pumping station in this city in 1914, the proposal of the Babcock & Wilcox Company was to have the installation complete in fifty-three days, while the offer of the next bidder on the same type of boiler was to have the installation complete in 131 days, being a difference of seventy-eight days. The penalty in that case was \$15 a day, but the sum of \$1,170 was necessarily added to the proposal of the firm requiring the greatest number of days to complete the installation, and this sum, if that firm had been the lowest bidder, would have made it the highest bidder.

On this installation, that is, the Fairmount pumping station, there were four or five competitors, and the Babcock & Wilcox Company, knowing that there was competition, agreed to complete the installation within a less number of days than any other person or firm submitting proposals. So far as the Division avenue pumping station is concerned, the Babcock & Wilcox Company knew there was to be no competition, and it took all the time that it deemed necessary. If there had been competition, and this company knew that there would be competition, it undoubtedly would have agreed to complete the installation within forty or fifty days, because it is specially equipped to do so. While the number of men that may work upon the construction of one boiler is limited, the number of men that may work

1915.]

Mog v. Cleveland.

upon five boilers may be five times that number. And besides, as has already been pointed out, the advantage of having designs for its various classes and types, special machinery and material in stock, can not be ignored.

In competitive bidding, the word competitive means pertaining to or involving competition; which means, as defined by the Century Dictionary, "The act of seeking or endeavoring to gain what another is endeavoring to gain at the same time." If two persons are endeavoring to gain the same thing at the same time, the essence of competition requires that each shall be free to act and have equal opportunities to secure the object sought. If one is hampered or restricted by conditions that do not apply to the other, the principle of *laissez-faire* is invaded, and competition is destroyed. Competition and monopoly are precise and exact opposites, and anything tending to destroy competition inevitably tends toward monopoly. See *State v. Central Lumber Company*, 123 N. W., 504, at 512.

To avoid and escape the evils of monopoly, and the moral depravity it too often engenders, furnishes the real reason why the law, voicing the public will, demands as a *sine qua non* that purchases by municipal and quasi-municipal corporations involving expenditures above a prescribed sum shall only be made by or after competitive bidding. The common experience of men points unerringly to the fact that, to enable a consumer or buyer to obtain the best possible terms, there must be free competition in an open market. It is a maxim of the law of trade that the more facilities there are for exchange the greater will be the benefit to all concerned.

That competition has a salutary effect upon price will not be denied. The minimum price of an article is measured by the cost of production, while the maximum is measured by the profit that can be exacted or extorted by the producer. Much can be said in favor of the proposition that a buyer, even though a municipal corporation, should have the right of selection; but when the right of inclusion, as well as the right of selection, is insisted upon by a municipality, courts may interfere to prevent com-

bination; for, as has been well said, "Where combination is possible, competition is impossible."

The Sterling Boiler Company no longer exists. It was absorbed by the Babcock & Wilcox Company, and no doubt for the reason that the Sterling boiler came into sharp competition with the Babcock & Wilcox boiler, and that competition between the two had a tendency to lower prices on the classes of boilers made by the two companies; and it must be admitted that these classes of boilers are unquestionably of high efficiency. Having taken over the Sterling Company, the Babcock & Wilcox Company is so thoroughly, scientifically and mechanically equipped to manufacture these two classes of boilers that firms and corporations equipped only to make a different style or type can not, in the nature of things, commercially compete with that company.

In this connection, the language of the court in *Amp't v. Cincinnati et al.* 17 C. C., 516, is strikingly pertinent. In the case before the court, a peculiar and particular kind or type of pump was specified. In the opinion, page 521, the court says:

"The machinery required for this work is only capable of being built by ten firms in the United States. Of these, eight were bidders on this work. The difficulty that presented itself at once to the trustees in making the exact drawings and specifications of every part was this: Machinery of this magnitude has as yet not reached that state of perfection, and probably never will, where all builders build to any certain and fixed plan as to details. In this respect each builder has his own detailed plans, and no two are alike, and their tools and patterns are made to produce their own work after their own plans; therefore, if the detailed plans of this complicated work were to be given in all its parts, the trustees were either compelled to adopt the plans of one of the concerns which had produced such work, or else get up a plan of the same kind of their own. It will be seen at once that the object of the law would be defeated if the board were to adopt the detailed plans of any one of the firms, for this would virtually destroy all bidding by firms other than the one whose plan was adopted, and place the trustees at the mercy of that firm. The price to the city would in all probability be much greater than it should be. This would destroy competition in

1915.]

Mog v. Cleveland.

bidding, the very thing the law was intended to bring about, and this must not be except from necessity. * * *

"In the next place, no firm could construct such machinery so well or so cheaply as it could machinery of its own pattern and design. And then lastly, which is the most important of all, it would when completed be more or less experimental, and might not perform the work required of it."

Referring again to the specifications, we find that clause 42 provides:

"The boilers shall consist of horizontal and cylindrical water and steam drums, and inclined water tubes connected with the drums direct or by means of sectional headers."

Based upon factory equipment, this clause limits competition to the Babcock & Wilcox Company, and the Flanner Company of Akron, Ohio; and this latter company is excluded by clause 47, which reads:

"Each header shall be of the sinuous sectional type. Each section shall hold one entire vertical bank of tubes. They shall be made of open hearth forged steel, and shall be equipped with hand laid plates having the joints on the inside of the headers."

The Akron company make a cast steel sectional header type of boiler, and as clause 47 provides for a forged steel sinuous sectional header, to manufacture which the Babcock & Wilcox Company has provided special machinery costing \$250,000, it will be readily seen no one can commercially compete with it in making that style of sectional header boiler. Much stress is placed upon the claim that forged steel is vastly superior to cast steel, for the reason, as the commissioner of water claims, that cast steel, owing to blow holes, is not as strong or durable as forged steel. He might have added that cast steel has other defects such as piping and segregation. As the "pipe" occurs at the end of the cast, this can be cut off, but the segregation, which is the tendency in cooling to drive to the center of the cast the impurities, can not be well eliminated. On the other hand, the uncontra-

dicted testimony of the plaintiff's expert witness, Professor Kidwell, shows that in the process of making the sinuous sectional forged steel headers by the Babcock & Wilcox Company, the steel is heated to incandescence from five to seven times. If this is true the quality of the steel must be impaired. Steel is only an arbitrary name for wrought iron, having a moderate carbon content of from one-third per cent. to two and one-fifth per cent. The carbon in the fuel used for heating wrought iron has so strong a carburizing action as to turn some of it into natural steel, and raising steel frequently to a high temperature, with the resulting cooling, in a fuel containing carbon, must have a tendency to still further carburize it and render it hard and brittle; so that what may be gained in using forged steel may be lost by this frequent heating and cooling. Hence the question of superiority as between cast steel and forged steel in sectional header boilers is still an open one, and Commissioner Schulz is not justified on this ground in excluding the cast iron header from competition simply because it may have blow holes and other defects

Clauses 45 and 46 of the specifications read:

"Each boiler must be equipped with steam and water drums of ample size. The water space in the steam and water drums shall be not less than 220 cubic feet. The steam space in the steam and water drums shall be not less than 172 cubic feet.

"Separate mud drums are to be provided at lowest point of boiler, and they are to be made of the same quality of steel as the water drums."

By referring to the definition of a Sterling type of boiler, it will be seen that these clauses, taken in connection with clause 48, name or specify the Sterling type quite accurately. Clause 48 reads:

"In all boilers constructed to have the water tubes connected direct to the steam and water drums, there shall be at least three drums containing steam and water, and one water drum."

Clause 49 provides that this type of boiler shall be a four pass baffle boiler.

1915.]

Mog v. Cleveland.

Clause 73 provides that the tubes shall not be less than four inches in diameter. In the Sterling type the tubes are four inches in diameter. A great many boiler makers use the three-inch tube, and their equipment is designed to punch that sized hole in the plates. The water and steam space provided or called for in clause 45 is calculated upon a 42-inch drum, and this is the size of the standard Sterling drum. There can be no possible doubt but that the commissioner of water drew and prepared these clauses of the specifications to meet and fit the conditions of the standard type of the Sterling boiler manufactured solely by the Babcock & Wilcox Company. If there could be any doubt as to this proposition, it vanishes and is dissipated by the statement of Mr. Stage, director of public utilities, made at a meeting of the board of control, May 10, 1915, at which meeting the matter of proposals for the Division avenue pumping station was under consideration. A stenographic report of the proceedings of that meeting is in evidence. Mr. Stage, speaking of proposals for boilers in 1914, possibly the Fairmount station, is reported to have said:

"Boiler men were here, claiming that it was unfair for the city of Cleveland, through its division of public utilities, to make specifications which permit other boiler manufacturers to bid, and then did not give consideration to their bids, because the water department engineer, if not the director of public utilities, was wedded to the B. & W. Boilers. Now, we have made it perfectly evident that that is true, and we are shouting it from the house-tops, and we are yelling it just as loud as we can yell it, that it is true, that that is the type of boiler we want."

These are "winged words," and yet it can not be said they do not voice correctly the state of mind of the director of public utilities, for Mr. Baker, the mayor, a witness during the hearing before the court, in his testimony, remarkable for its candor, frankness, clarity and lucidity of statement, said:

"Mr. Stage came to me and told me that he had decided to advertise for exactly the thing that was wanted; that it was specified the B. & W. or Sterling type of boiler, and that he had determined to have the specifications quite frankly do that. And

he told me his reasons for doing it was, in the first place, that it was the type the department wanted, and he believed, as director of the department, that they had the right to have what they wanted; and in the second place, he did not think it would be fair to advertise what might be called wide open specifications and invite manufacturers to make types of boilers which the department knew in advance it did not want, and it was putting men to the expense of making bids and stating specifications and putting in those bids when there was no possible chance of their being successful."

From this clear and concise statement, it appears that the director of public utilities did not believe it was good policy to advertise for "wide open specifications," for the reason that in so doing they might get or be tendered boilers "which the department knew in advance it did not want." This is tantamount to saying that the department would not take and did not want boilers of a certain type or class, no matter how efficient or well adapted to the purposes in hand such boilers might be. Of course these gentlemen relied mostly upon the judgment of Mr. Schulz, the commissioner of water, though it may be said that for men of no practical factory or shop experience, or men who never pulled a throttle or turned a steam valve as a means of livelihood, they are evidently possessed of quite a remarkable knowledge of boiler efficiency and construction. That Mr. Schulz believes the Babcock & Wilcox Company's type of boilers is the best anywhere made, is admitted. He is quite frank in his preference in this direction. Indeed, it is more than a preference; it is a bias in favor of that type and a prejudice against all other types of styles of boilers. The testimony distinctly shows that his prejudice is unwarranted, that his bias is the result of a one-sided tendency of his mind, a species of sterling auto-hypnotism, and is not the result of thorough, candid, impartial investigation. The specifications provide that proposals must state the location of installations, so that the commissioner of water or the director of public utilities may make inquiries as to the efficiency of such installations. There is an installation in the Philadelphia water works department of the Badenhauser

1915.]

Mog v. Cleveland.

boiler type, where the same number of prime mover units are used or required that are required for the Division avenue pumping station. Mr. Schulz was aware of this installation, and upon one occasion visited Philadelphia, but did not think it necessary to examine it in actual operation. While this particular installation was in process of finding itself, and the employees operating it were engaged in finding it, some defects were noticed and reported to Mr. Schulz by the superintendent of that station; but after the boilers had found themselves, and after the engineers and stokers had thoroughly understood the method of using these boilers, an entirely different report was made, showing high efficiency and that the boilers gave complete satisfaction in every respect. This was also reported to Mr. Schulz, but ignored by him, evidently upon the theory that nothing good could come out of the Badenhausen Nazareth.

The last question asked Mr. Schulz by counsel for the plaintiff was this:

“Q. Now, candidly, Mr. Schulz, as an engineer, don't you think that if the city, instead of attempting to dictate to designers of boilers, had merely specified the results which they desired should be obtained or attained by the boilers submitted to competition, and then thrown the door open to all designers of boilers, that you could have had competition and yet been able to select from the competing boilers the best one?”

To this question he promptly answered: “I candidly think that that would not have been the case.”

In other words, he distinctly says that the city, in his opinion, could not obtain the best boiler equipment or installation through competition. This is an admission that there was no competition, and that when the specifications were drawn it was not intended that there should be. It must be said, however, that the testimony does not disclose in the slightest degree, nor was it even hinted in argument, that the mayor, the director of public utilities, and the commissioner of water were not absolutely and irreproachably honest in their belief that the city of Cleveland would be best served by the purchase of the types of boilers

called for by the specifications. Their integrity of purpose and honesty of motive in the premises is not questioned by any one. It is admitted, and must be admitted, that these gentlemen were actuated solely and only by a high sense of civic duty in their desire to secure for the people of Cleveland the best and most efficient boiler installation for the Division avenue pumping station that the market afforded. With this desire and the motives that prompted it, we are in full accord; and yet, in their desire to accomplish a purpose and result above and beyond the faintest breath of suspicion, and a purpose possibly beneficent and wise if measured by considerations pertaining to the present, have they not lost sight of the potential possibilities for evil in the future if the principle of competition is ignored, undermined or destroyed?

Looking to the future, we are inclined to hold, that in order to preserve inviolate the principle of competitive bidding in the purchase of supplies, it is to the interest of a municipality to undergo and suffer some loss and inconvenience if necessary in the present, if by so doing the evils of gross fraud in the future are eliminated and prevented.

Section 3311 of the General Code provides that:

"No municipal corporation shall adopt plans or specifications for a public improvement required by law to be made by contract let after competitive bidding, which requires the exclusive use of a patented article or process, protected by a trade mark, or an article or process wholly controlled by any person, firm or corporation or combination thereof."

But it is claimed that this section of the Ohio Code has no bearing upon the issues before us, for the reason that the city of Cleveland is operating under a charter giving it full power of local self-government, and that the provisions of the charter relating to competitive bidding are not as broad as those of the statute. And indeed the claim is made that the city may practically, in the exercise of its powers of local self-government, do whatever it chooses to do or deems best.

1915.]

Mog v. Cleveland.

It will not be denied that this section of the Code embodies at least the settled policy of the state. The statute was in existence long before the Constitution as amended September, 1912, conferred upon municipalities the option to exercise the powers of local self-government in the manner therein provided.

Section 167 of the Charter of the city of Cleveland provides for public improvements of all kinds, employment of labor, and the necessary purchase of supplies and material therefor "by contract duly let after competitive bidding."

Section 119 of the Charter provides that the commissioner of supplies, before making purchases, "shall give opportunity for competition under such rules and regulations as the council shall establish."

The same phraseology, that is, competitive bidding and competition, is used in the ordinances and resolutions of the council relating to this improvement. The framers of the Charter, when they used these terms, phrases or words, used them undoubtedly in the sense in which they were then, and before that time had been, understood.

In *State, ex rel, v. Lynch*, 88 O. S. ,71, the interpretation of the words, or, rather, what was meant by the words "the powers of local self-government," found in Section 3, Article XVIII of the Constitution, was before the court. This is the amendment of September, 1912, granting to municipalities the power of local self-government. Shauck, J., in the opinion, page 96, said:

"In the amendment the phrase is used without definition and with the manifest intent that its operation should be according to its established meaning. It is fundamental in interpretation that statutes in derogation of the common law and amendments to statutes and constitutions shall have such and only such operation as is due to the natural import of their terms. The effective search for truth as well as the decorum due the convention and the people by whom the amendment was framed and adopted requires us to impute to them a knowledge of that fundamental and familiar rule, and also to assume that they expected the courts to apply it to their work. Since municipalities get their powers from the state, it is mathematically certain that they

can include no power not possessed by the state. Local self-government is necessarily a part of government less than the whole."

Again, in *Fitzgerald v. Cleveland*, 88 O. S., 338, the construction of the same phrase was before the court. Johnson, J., page 359, said:

"It is a well-settled rule that the body adopting amendments such as are here involved will be presumed to have had in mind the course of legislation and existing statutes touching subjects dealt with."

And the learned judge cites *People, ex rel Jackson, v. Potter*, 47 N. Y., 380, and cases there cited in support of the proposition. See also *Quigg v. Evans*, 121 Cal., 546.

We have no doubt but that by the phrase "competitive bidding," found in Section 167 of the Charter, the framers of that instrument meant to prohibit municipalities from adopting plans or specifications for a public improvement which require the exclusive use of an article controlled by any person, firm or corporation, and we so hold. This is the meaning given these words when found in statutes, not only by our own but by the courts of practically all the states.

The case of *Smith v. Syracuse Improvement Company*, 161 N. Y., 484, is directly in point. No. 2 of the syllabus reads:

"A petition for the pavement of a street in the city of Syracuse, 'with vitrified paving brick, manufactured by the New York Brick and Paving Company, of Syracuse, N. Y.,' and all the proceedings had thereon by the common council, are in violations of the provisions of the city charter requiring the work to be let to the lowest bidder, and are void, when it appears that the company referred to has a complete monopoly upon the disposal of such brick, and that there are other persons or corporations who manufacture and sell vitrified brick for paving purposes, equal in quality to the particular kind specified."

This was practically done in the specifications under consideration. It is true that the Babcock & Wilcox Company is not expressly named, but it is so in effect.

1915.]

Mog v. Cleveland.

If a municipality advertised for a thousand tons of coal, and specified that the coal should have a carbon content of at least 90 per cent., everyone would know that anthracite was meant as specifically as if it had been named, as no other coal could meet the requirement. It is no answer that any well-equipped boiler manufacturer could make the boilers called for; and for the reason, in addition to those already stated, that the discretion vested in the board of control, the director of public utilities and the commissioner of water, to determine who is the best as well as the lowest bidder, would most probably enable the board, the director and the commissioner to so award the contract as to secure the type of boiler the director of public utilities declared in advance that the city wanted and was determined to have.

It has been held that "lowest and best bidder" means one who complies with all the requirements of the specifications, not merely one whose bid is less than his competitors. *Boseker v. Wabash County Commissioners*, 88 Ind., 267.

And again, the question of responsibility in the sense of being accountable and able to discharge the obligation so as to save the city from loss may be involved in determining the question of the best or most responsible bidder. *Gutta-Percha Company, v. Stokely*, 11 Phila., 219, 221.

Under the specifications as drawn, it would be difficult indeed to assail the discretion that might be exercised in these respects. The city seemed determined to secure just what it wanted, and nothing else, no matter how efficient it might be, and prepared specifications with that end in view; and so far as the specifications are concerned, they most admirably provide for that result; for if the specifications are not sufficient to secure the end sought, the right is reserved to reject any and all bids.

It is difficult to understand why the defendant municipality should attempt to exclude any type of boiler, in view of clauses 134 and 135 of the specifications. These sections read:

"Before acceptance of the boilers by the City of Cleveland, Ohio, they will be operated by the city employees for a period

of ninety days, during which time they will be subjected to such examinations and tests as may be considered advisable to determine whether or not the conditions of the specifications and the contract have been complied with. The contractor or his representatives to have free access to any boilers during these ninety days, but they are not to interfere with the operation or test.

"The evaporation tests to determine the economy and capacity of these units shall be made by the commissioner in accordance with the rules of the American Society of Mechanical Engineers."

It is difficult to imagine how any boiler maker, in view of these clauses and in view of the fact that he is required to give bond for the faithful performance of his contract, would undertake this installation and the expenditure it entails, unless he felt morally certain, if not absolutely assured, that he could meet the tests and trials required. It is still more difficult to conceive how the municipality could be in any way injured, or be in any way in danger of any loss, by any installation of any kind or type of boilers installed if the installation met the trials and tests herein provided for. Surely no man or corporation would expend over forty thousand dollars experimentally and run the risk of such loss if his installation proved a failure. If the boilers installed did not develop the efficiency and meet all the conditions demanded by the specifications after trial and test of ninety days, they could be rejected and ordered taken out.

In *Fischer Auto & Service Company v. Cincinnati et al*, 16 N.P.(N.S.), 369, the question of purchasing an automobile for the city of Cincinnati was under consideration. The court found that no known make of automobile, except the Hudson, came within the requirements of the specifications, every other machine being disqualified by reason of overweight or some other distinguishing feature; and it was admitted that the Hudson was the make the city wanted, and that the specifications were drawn to effectuate that purpose.

It was held that, under the specifications, competition was commercially impracticable, and the city was enjoined from awarding the contract.

1915.]

Mog v. Cleveland.

Where county commissioners desired stone for the superstructure of a bridge, it was provided in the specifications that "all stone to be used for masonry in superstructure and wing walls of said bridge must be what is known as Berea bridge stone, and come from the quarries at the town of Berea, Ohio." In No. 5 of the syllabus it is held:

"Anything which tends to abridge the right of tax-payers, so far as public improvements are concerned, to purchase at the lowest price in an untrammelled market, is in violation of the law. Nor is it necessary that an evil appear or that injury is done; it is sufficient that the inevitable tendency of the act is injurious to them. *Thraikill v. Amlin et al*, 13 O. D., 34.

In *National Surety Company v. Kansas City Hydraulic Pressed Brick Company*, 73 Kans., 196, it appears that the brick made and sold by but one company was specified. It was held that this was "contrary to public policy in restricting and preventing free competition."

See also *Swift v. St. Louis*, 180 Mo., 80 to 89; *Glennon v. Gates*, 136 M. App., 421.

It will be quite unnecessary to cite, as might be done, many additional authorities to the same effect. Counsel for defendants cite *Hobart v. City of Detroit*, 16 Mich., 246, and *Saunders v. Iowa City*, 134 Ia., 132.

In the first of these cases the opinion was written by Judge Cooley, a jurist of acknowledged preeminent ability. The doctrine of these cases is only an exception to the general rule based upon necessity. Otherwise the doctrine laid down does not differ materially from that in cases generally relating to this subject.

If a municipality desires, for certain avenues or boulevards, devoted mainly to the use of pleasure vehicles, an asphalt pavement because of its greater resiliency, it may specify Trinidad asphalt, for the reason that it is universally recognized as superior to all others for paving purposes. The softening point of this asphalt is 160° F., while that of the Venezuelan is 113° F., and that of Cuba as low as 100° F. It is unnecessary to state that an asphalt the melting point of which is as low as 100°, or

even 113°, if used as a pavement in this latitude might, on some day of August or July, become a "shirt of Nessus" to automobiles driven thereon. Hence the necessity for using an asphalt, if asphalt must be used, of a higher melting or softening point; and as the Trinidad asphalt only meets the requirement, it becomes a necessity. The Trinidad asphalt concession does not expire until 1930, and it is therefore a natural monopoly; and if the interests of a city demand it for a particular pavement, the city must either pay the market price or dispense with that kind of material.

Again, an article may be patented, but be of such superior excellence that necessity demands its use. For instance, suppose a police or fire alarm system transcendently superior to any now known should be discovered and patented; the city of Cleveland might be compelled to adopt it, or else lose its place "on the hill." In the Detroit case the city felt it must have the Nicholson pavement shortly after that species of pavement came upon the market. It was a patented article, and was foolishly for a time supposed to be the *ne plus ultra* or last word in paving. The city of Detroit believed it was a necessity, as did many other cities at that time. In the Iowa case it seems large claims had been made for a patented bitulithic pavement, and the city and a majority of the property owners on a certain street, believing their health, convenience and pleasure depended upon it, petitioned for it and got it. The decision turned largely upon the construction of the Iowa code, but the court, in the opinion, page 145, used this very significant language:

"What is meant by this statute is, that there must be competition where competition is possible."

If Iowa City wanted a bitulithic pavement, and nobody but the patentee made it, and the city believed its necessity demanded it, why, of course competition was not possible under such circumstances.

We think the rule is stated quite accurately in Section 1204, *McQuillin on Municipal Corporations*. A portion of this section is as follows:

1915.]

Mog v. Cleveland.

“As already stated, one of the exceptions to the rule requiring competitive bidding exists where the subject-matter of the contract has a monopoly, as in the case of a contract for lighting where there is only one light company in the municipality.”

The board of control of this city need not be informed of the efforts which the city made to rid itself of the evils of monopoly in electric lighting where there was practically but one electric light company in the city; and all will remember that the citizens of Cleveland voted a bond issue of two million dollars for the purpose of erecting a municipal light plant, in order that the people might not be subject to the extortions and exactions of that monopoly. It is a matter of common observation that the erection of this plant, even before it was prepared to distribute current to users, had a salutary effect upon the price of electricity used for lighting and power purposes. We think a bare reference to this subject will be sufficient to indicate the necessity for competition in every instance where competition is at all practical or possible. But quoting from McQuillin further, Section 1204, the author says:

“On the other hand, a different proposition presents itself where there are several manufacturers who produce a certain article, and where other material can be secured from two or more different localities. In such a case it is held in nearly all the decisions that bidding can not be restricted by requiring bids on unpatented articles manufactured by a particular firm, or material obtained from a particular locality. In other words, where specifications are so drawn as to confine the bidding to one company, firm or individual, although others are engaged in the same business and can do the work or supply the materials, a contract let thereunder is void. Thus, where the specifications limited the rock asphalt to be used to that mined in four mines, it was held in Louisiana that they were too narrow, where good rock asphalt is obtainable from many mines.” Citing *Redersheimer v. Flower*, 52 La. Ann., 2089; 28 So. 299.

We believe the doctrine here laid down is conclusive of the issues in the case before us, and therefore the prayer of the petition will be granted; and as the hearing is upon the merits, the injunction will be made perpetual.

**REPRESENTATIONS AS TO WHETHER LAND WAS SUBJECT TO
OVERFLOW IN TIME OF FLOOD.**

Common Pleas Court of Hamilton County.

MARGARET BIERE ET AL V. MATTIE A. STERRITT, WILL S. STERRITT
AND THE GUARANTEE DEPOSIT COMPANY.

Decided, June 25, 1914.

Fraudulent Representations—Where the Truth or Falsity of Representations Could Have Been Learned by the Exercise of Diligence, Equity Will Not Grant Relief—Representations Can Not be Treated as an Assurance of Future Events.

A transfer of property will not be set aside on the ground of false representations as to its not being subject to overflow in time of flood in the river upon which it abuts, where the fact of the land having been overflowed in the past was known to persons living in the vicinity who could have been easily consulted by the purchaser, and as to whether it would be overflowed by some extraordinary flood in the future (as it was) no one could foretell.

Clore, Dickerson & Clayton, for plaintiffs.
Ritchie & Platt, contra.

COSGRAVE, J.

The plaintiff in this action is seeking to set aside a certain transfer of property between the plaintiff and the Sterritts, whereby the Sterritts accepted certain property on Jackson street, Cincinnati, in exchange for their improved farm of some sixteen acres near Remington, Ohio, the Sterritts having accepted the Jackson street property and a second mortgage for \$599 on the Remington property in exchange for the same.

It is claimed by the plaintiff that the Sterritts fraudulently represented to her that their property was not subject to overflow from the Little Miami river, which abutted upon the property, and that relying upon the said alleged representations, having no knowledge or information in regard to the facts, she exchanged her property.

1915.]

Blere v. Sterritt et al.

It appears from the evidence that the negotiations for the exchange of these properties were carried on during the months of June and July, 1912, the deeds exchanging the properties being executed on July 24, 1912.

It is also in evidence that the Sterritts for a valuable consideration transferred the \$599 second mortgage to the Guarantee Deposit Company as collateral for a loan and that they also increased the loan on the Jackson street property, and that the Guarantee Deposit Company appears to be an innocent party in this entire transaction.

It appears from the evidence that the plaintiff took possession of this property and remained in possession until the flood of March, 1913, which overflowed it.

The evidence as to the statements or representations made by the Sterritts presents a well marked conflict. The case was tried at great length, a large number of witnesses being heard on both sides. The issue narrows itself down to the simple question whether or not the plaintiff has shown a state of facts which would justify a court of equity in granting the relief prayed for.

There is no question in this case of confidential relations between the parties. They were all persons of mature years and apparently possessing a very fair degree of intelligence.

It practically resolves itself into the question whether or not the plaintiffs relied or had a right to rely upon the representations alleged to have been made by the defendant, Sterritt, and whether such representations were false.

It may be considered a settled rule in equity that where the truth or falsity of facts can be obtained by the exercise of care and diligence on the part of the person complaining, and having failed to do so, they can not plead such want of knowledge of the facts causing the injury complained of, thus seeking to have the law do for them that which they could very readily have done for themselves by the proper exercise of diligence and caution. He who can see and should see and does not see, can not complain of ill results arising from failure to see.

The courts are not bargain makers but simply construers of bargains according to well established rules of law. If it were otherwise the courts might be called upon to exercise judgment as to business matters as to which they would be very much less qualified and competent than the parties involved in the controversy.

The evidence seems to show conclusively that the plaintiff herein from the very outset of the negotiations looking to the exchange of this property, was in a state of apprehension, almost fear, that the waters flowing through the Miami river would overflow the Sterritt property.

A review of the record in this case shows that at the very first visit of the plaintiff to the Sterritt property, she expressed such an apprehension. This was some considerable time before the consummation of the exchange of properties.

It is in evidence that Mr. Bray, who visited this property as a friend, advisor, and business representative of the plaintiff, for the purpose of obtaining information with reference thereto, to enable him to give his opinion and advice with reference to the matter, informed her that he believed the river would overflow this property.

It is also in evidence that at the time of the flood of March, 1913, in conversation with her friend, Mrs. Duerner, the plaintiff remarked to her "The neighbors told me I would get it, but I never thought it would be possible. You know I was so confident it wouldn't come.

It does not appear by a preponderance of the evidence that this feeling of confidence was justly inspired by representations made by Mr. Sterritt. There is a direct conflict between the plaintiff and the Sterritts as to what was said of the action of the river with reference to this property, in the times preceding its transfer. The burden is upon the plaintiff to establish by a preponderance of the evidence not only representations by Sterritt, but also their falsity, and the court does not feel that this has been done.

Assuming however, that the plaintiff has, by a preponderance of the evidence, established representations by the Sterritts as

1915.]

Blere v. Sterritt et al.

to preceding overflows as a basis for a belief as to the subsequent conduct of the river, it would be, after all, only an opinion as to the probability or improbability of a certain event taking place in the future, over which the Sterritts could not have any possible control nor accurate knowledge.

Conceding all that could be claimed from the evidence, that Sterritt falsified as to the number of times the water had been on his property, and that therefore it was reasonable to conclude that it would not be there any more frequently after the transfer, could this in any sense in law be said to be a misrepresentation affecting the rights of the parties?

The effect which it is urged upon the court these representations had upon the plaintiff, was based upon matters, events and conditions to take place in the future and as to which neither of the parties could have any influence or control. They were dealing with the future action of one of the elements, namely, water flowing through a natural water-course.

The judgment of the plaintiff as to this was as much to be relied upon as the judgment of the Sterritts. What assurance could the defendants, any more than the plaintiff, have as to the future conduct of this water-course? How could either of the parties foresee these "unexpected visitations whose comings are not foreshadowed by the usual course of nature and must be laid to the account of Providence, whose dealings through they may afflict, wrong no one." Neither had any advantage by way of superior knowledge; neither had as to the other, a superior gift of foresight, if there be such a thing, which would lead to the just interference that any unfair or unjust advantage had been taken in this matter. If we are to judge the future by the past, then by the exercise of ordinary care and diligence, the plaintiff and her chosen friends and advisers, by an investigation among the neighbors, could readily have ascertained the truth or falsity of the representations of the Sterritts and it was their duty under the law, especially being in an apprehensive state of mind, to have sought other means of information as to a matter which surely must have been known to numerous people living in that vicinity. The flood of March, 1913, which brought

the relations of these parties to a climax, could in no event be said to be in the usual course of nature. It was unprecedented in character; so much so in fact that it has been held and accepted as what is recognized in law as "An act of God."

There is no question of concealment of facts in this case. They were as open to the investigation of the plaintiff as they could have been to the knowledge of the defendants. It seems quite clear to the court that the plaintiff by the exercise of ordinary care and diligence, could have known everything that the Sterritts knew about their property, and failing in the exercise of that diligence and caution, which the law exacts from all persons, the court is of the opinion that the plaintiff is not entitled to the relief prayed for.

As in all cases of this character, there is in this case something which appeals to the sympathy of the chancellor and if he could be allowed to be swayed by sentiment, he might come to a different conclusion, but the court must not be controlled by sentiment and by his emotions, but by fixed rules of law and equity, to which he is bound to yield allegiance and obedience.

The established rules relating to and governing actions of this character are founded upon the highest wisdom and the soundest of common sense and all are bound by them.

The court is therefore of the opinion, and finds, that the plaintiff has not made out such a state of facts as would warrant this court in granting the relief prayed for and the petition is herewith dismissed.

1915.]

Kaczmarek v. Independence.

REGULATION OF THE JITNEY.

Common Pleas Court of Cuyahoga County.

MIKE KACZMAREK v. THE VILLAGE OF INDEPENDENCE ET AL.

Decided, July 28, 1915.

Municipal Corporations—Authority of, to Regulate Jitney Busses in Their Use of the Streets—What Constitutes Reasonable Regulation.

1. In the exercise of their general police power and under the authority of the statutes providing for control over the use of the streets, municipalities may regulate the operation of jitney busses. Such regulation should be reasonable, but ought to be sufficiently effective to provide for the safety of the public and protect property rights.
2. It is not unreasonable to require that one who operates jitney busses shall execute a bond in the sum of \$10,000 securing payment of damages to any person or for any property injured through his negligence; that he provide continuous service at regular intervals in bad weather as well as good; that he shall be held to the same degree of care as the law imposes on other common carriers, and that he employ no chauffeur who can not speak the English language.

Palda & Svarc, for petitioner.*Cline & Minshall*, contra.

FORAN, J.

This case is before the court upon an application for a writ of habeas corpus. On the 28th day of May, 1915, the petitioner, Mike Kaczmarek, was arrested upon a warrant issued by the mayor of the village of Independence, upon affidavit filed before him charging that the petitioner, without having first obtained a license from the village of Independence, did then and there use and occupy a certain street, to-wit, Brecksville road, within the corporate limits of the village of Independence with a certain automobile for the carriage of persons for hire, and did then and there operate said automobile for the purpose of affording a means of local street transportation similar to that ordinarily afforded by street railways, contrary to the provisions of ordi-

nance No. 25 of said village of Independence, Cuyahoga county, Ohio.

It appears that the village of Independence, Cuyahoga county, Ohio, in the month of April, 1915, passed an ordinance regulating vehicles and the use of the streets and requiring every person carrying on the business of transportation of passengers for hire to obtain a license before commencing business. Section 1 of this ordinance requires that a license be obtained by any person desiring to carry on the business of transporting passengers for hire within the corporate limits of the village of Independence. Section 2 provides that the route over which such persons intend to travel or carry passengers, and the schedule they expect to give, shall be designated and a map thereof furnished. Section 3 requires the owner of all vehicles to be used for such purpose to pay a license fee of twenty-five dollars, which shall be paid to the public service street repair fund. Section 4 provides that a bond in the sum of \$10,000 shall be given for the operation of one or more automobiles or vehicles, conditioned to the effect that, in the event of any person or property being injured or damaged by the negligence or carelessness of the driver in the operation of the owner's automobile, the person so injured, either in person or property, may recover therefor; that is, the bond is given for the benefit of persons who may be injured in person or property by reason of the operation of such automobile or vehicle. Section 5 provides regulations as to the character and kind of person who shall be employed to drive such automobile, including his age and intelligence. Section 7 provides that the automobile so used shall be kept in a clean and sanitary condition, and contains regulations for traffic and for preventing overcrowding of such vehicles. The other sections relate to matter of administrative detail.

The petitioner claimed that his arrest was-unlawful, for the reason that said ordinance is void and of no effect, in that the council had no authority to require a bond as provided for by Section 4 of said ordinance. It is also claimed that the license fee is unreasonably excessive and that the council had no authority to regulate fares; nor had the council authority to impose, as

1915.]

Kaczmarek v. Independence.

a condition to granting a license, that the operator shall have a sufficient knowledge of the English language to carry on an intelligent conversation, as provided by Section 5 of the ordinance.

It is conceded that the petitioner, Mike Kaczmarek, does not reside in the village of Independence, and that he is not a taxpayer in said village, and that at the time of his arrest he did not operate his automobile exclusively in said village, but carried passengers from Cleveland and other localities to and through Independence, and from said village to Cleveland, and other places along Brecksville road.

The issues involved are, perhaps, new in this locality, but in western cities and in the coast cities the operation of what is known as the "jitney bus" is well known and understood. The use of the automobile as a means and mode for the transportation of passengers in cities and villages is of comparatively recent origin, and arose, as has been said, in the western cities, but has been proceeding with rapid strides all over the country.

The case was ably, skilfully and learnedly presented by counsel, and elaborate briefs, showing great research and discriminating marshaling of authorities, have been filed. To some extent the questions presented in the argument and by these briefs are new and novel, but in the final analysis the application of the old legal principles to new conditions will be found decisive of the questions involved.

The present age is one of change and transformation. The dream of yesterday is the reality of today, and the precursor of greater things for tomorrow. The tallow dip and the electric light furnish no greater contrast than the farmer's stone boat and the automobile. In every department of industry, in commerce, in travel, transportation, transmission of power, and transmission of news and thought, we see the rapid passing of one mode of doing things to some improved mode of accomplishing the same or a better result with less effort and in less time. That all rights may be preserved and all be protected, the law must meet these changing conditions in production, distribution and transportation. The jitney bus is a part of the general social and industrial evolution everywhere seen and manifested.

Electricity put the horse car and the cable car in the discard. While the jitney will have no such effect upon the electric street car, it has and will curb and destroy transportation monopolies in cities and their suburbs. For this reason the jitney should be fostered within all reasonable limitations and its rights preserved. The advent and activities of this vehicle as a mode of passenger travel has been so rapid within the last year or two that state legislatures have not had sufficient time to subject it to intelligent regulation and supervision.

No sane, thinking man will for a moment contend that a wholly irresponsible and reckless person should be permitted to operate and run an automobile as a vehicle for the transportation of passengers through the streets of a municipality or the highways between municipalities. Of necessity, then, there must be regulation and supervision. The public safety and preservation of private as well as public property rights demand that this mode of conveyance be strictly and scrupulously regulated. In the absence of statutory regulation, municipalities in the exercise of their general police power and the authority conferred upon them by statute may, we believe, within the limits of their jurisdiction, regulate the operation of jitney busses. Such regulation, of course, should be reasonable, but it ought to be sufficiently effective to protect the public and preserve property rights, for the primary object of the police power of the state and of municipalities is not alone the prevention of crime and the pursuit and punishment of offenders, but also the preservation of order, removal of obstructions and nuisance, and the adoption and enforcement of local laws for the safety, convenience and comfort of the community.

The question as to what are the proper limits of the police power of a state or municipality, while a judicial one, is not always easily answered. It may be said, in a general way, that it depends in each case upon the relation of the act in question to the situation demanding the exercise of the power. In a long list of fluctuating authorities, it has been held to include the regulation of streets, highways, bridges, carriers, peddlers, drays and vehicles of all kinds. In these respects the statutes of Ohio confer full and ample power upon municipalities.

1915.]

Kaczmarek v. Independence.

By various sections of the General Code, municipalities are empowered to regulate the use of carts, drays, wagons, hackney coaches, omnibuses and automobiles, as well as every description of vehicle kept for hire, and to license and regulate the use of streets. The right is also given to prescribe the width of the tires of wagons and vehicles, to fix rates and prices for the transportation of persons and property from one part of a municipality to another, and by Section 3675, General Code, it is provided that all money and receipts arising from license fees shall be used for the sole purpose of repairing streets.

Section 3714, General Code, gives to municipal corporations special power to regulate the use of the streets, the power to be exercised in the manner provided by law, and the council is given the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts within the corporation, and it is provided in this section that all these streets, highways and alleys "shall be kept open, in repair, and free from nuisance." So it will be seen that the state has given to municipalities almost plenary power in relation to the control and management of streets and highways.

That the need of jitney regulation is important and necessary will be seen at once without the aid of any extended verbal illumination. That the automobile in the hands of an incompetent or reckless man is a dangerous menace to the public goes without saying. The daily list of deaths and accidents due to this mode of conveyance is shockingly appalling. Indeed, if the names of those who have been killed and maimed on any single day, especially Sunday, in the United States, through and by means of automobiles and electric-driven vehicles, were printed, they would occupy all the columns of an entire newspaper, and lead to the belief that the casualties due to the automobile accidents were worse than a battle in Poland or Flanders. In the hands of a competent, careful and proper person, the automobile is a blessing to civilization. The cost of constructing these vehicles has been largely reduced within recent years, and those who can afford their use are disposed to change old for new models, at least annually, if not more often, so that large indeed is the number of what are euphemistically called "used cars," and

what are in reality second-hand roadsters or touring cars. Many of these may be purchased for a mere nominal sum, and to say that any man may purchase or by some means acquire one of these discards, and carry passengers through our streets and highways, and be amenable to no authoritative regulation, is asking too much. The danger to pedestrians and other persons in vehicles of all kinds lawfully upon the highways would be vastly augmented and increased by the indiscriminate and unregulated use of such vehicles. While it is true that the jitney bus has come to stay, and has passed from the humorous to the serious stage of discussion as an economic possibility, still there are many reasons, social, economic and legal, why it should be subject to such regulation as the public safety and property rights demand. The jitney has its own problems which can only be equitably solved by experience and demonstration. It has been carefully computed that it costs seven cents a mile to operate a jitney bus, and therefore its existence as an economic possibility depends upon short haul business, in which field it strikes directly at the profits and revenue of traction companies. The street railway companies, recognizing this, are now agitating the question of an adjustment of fares upon a per mile basis; but this can never be accomplished so long as the inhabitants of cities seek to escape congested districts and provide themselves homes as far as possible from the noise and confusion, smoke and grime, of the mercantile and factory localities. To place street car fares on a per mile basis would make it practically impossible for any but the wealthy to live in country districts, or away from the center of commercial activity. The street railway companies are in many respects partners of the cities in which they operate. The municipality grants them franchises and rights of way and other privileges, and the property owners give their consent to use the streets abutting upon their homes or places of business. In return for these privileges, the street railways agree to give continuous service at prescribed regular intervals over the streets or lines fixed by ordinance, to carry patrolmen and firemen free, to give special rates to school children, to pave certain portions of the streets, and so run or operate their cars as to best serve

1915.]

Kaczmarek v. Independence.

the public convenience and the public safety. The street railways must operate their cars at all times irrespective of weather conditions, unless prevented by act of God or public enemy. It would be manifestly unfair to traction companies to permit the jitney, unrestricted and unregulated, to take the cream of the business without being in any way responsible for the use and the misuse of the streets and highways, and the safety of the public. The street railways pay taxes; it is right and proper that they should do so. If the jitney is to use the streets and highways, why should it not pay for such use? The license fee of \$25 for one or more automobiles or jitneys, run or operated by the licensee, is really in the nature of a tax. It is not unreasonable so far as the amount is concerned.

The right to license certain occupations is no longer an open question, nor has it been since the decision of the Supreme Court of the United States in the liquor cases in 1847. See 5 Howard, 504.

We have examined the ordinance of the village of Independence, now under consideration, very carefully, and can not hold that it encroaches upon the power of the state or the supreme law of the state. The requirement of Section 4, that a bond of \$10,000 be given for the benefit of any person injured or any property damaged, is not unreasonable. The jitney is, and must be held to be, a common carrier; and there is no valid reason why the highest degree of care for the safe transportation of passengers should not be exacted of those operating such vehicles. In other words, the jitney must be subject to the same law which governs all common carriers; and while it should not be unreasonably restricted, still it ought not to be accorded privileges that are not granted to other common carriers. The most that it can ask is to be placed upon the same footing or basis upon which any common carrier is placed. The man who knows he must respond in damages for careless and negligent conduct will always exercise the degree of care and caution the circumstances demand. Street railways must respond in damages if their servants negligently injure persons or property; and so must every citizen. Why not the jitney? There is a wide difference and dis-

tion between a private automobile operated by the owner or his servant, and an automobile crowded with passengers. The distinction between the two need not be pointed out; it will appear to any person of ordinary common sense.

As we have seen, the ease with which second-hand or discarded touring cars or roadsters can be procured places it in the power of almost any person to operate a jitney. A man without character, a man wholly irresponsible and of reckless propensities, who has nothing whatever at stake, in such a jitney or operating it, is as dangerous a menace to the community as a truck load of dynamite in the custody of a drunken driver. The man whose standing and character are such that others are willing to be responsible for him in the sum of \$10,000 may be safely trusted with the control and operation of a jitney bus. Besides, such a bond has a salutary effect upon the owner and operator of the jitney. If the provisions of this ordinance, even in a modified sense, could be applied to every owner and driver of an automobile, the holocaust of death and destruction, due to the use of these vehicles, would be greatly minimized. No doubt the state Legislature will deal with the jitney situation in due time, and so deal with it as to preserve it as a competitor with traction companies, and at the same time protect the public from the evils of a conveyance which, if unregulated, may become an unmitigated nuisance.

In the coast states and in the west and middle west, where the jitney has been in use, cities and villages have, by ordinance, regulated its use, and in many instances these regulations are quite restrictive and almost prohibitive, but the ordinances have been invariably upheld by the courts, so far as we are able to learn. Indeed, it may be said that the general trend of opinion in the Supreme Court of the United States since 1870 has been toward recognizing the police power of the several states as entitled to broad and wide scope. Municipalities, of course, derive their powers from the state, and there can be no question but that the statutes of this state give to municipalities ample power to pass the ordinance now under consideration, even in the absence of the adoption of a charter providing for local self-gov-

1915.]

Kaczmarek v. Independence.

ernment, which the Constitution of September, 1912, permits municipalities to do. The trend of modern social endeavor is toward giving municipalities full power to provide for internal regulation. If jitneys are to run in our streets, or on our highways, they must not be permitted to run or operate at will, or at the pleasure and convenience of the owners of these vehicles. They must be required to give continuous service at regular intervals, the same as street car companies. They must not be permitted to run on fine days, or when weather conditions are good, and not run when weather conditions are bad. They must bear their portion of the taxes of all communities through which they operate, and they must be bonded so as to protect and indemnify all those they negligently injure, whether in person or in property. It will not avail as an answer to say that such regulation will drive the jitney out of existence, and thus the benefits of its competition with traction companies be destroyed; nor will it avail to say that such regulation will prevent a man of limited means from operating a jitney. The ordinance under consideration seeks to test the character and standing of a man, rather than his financial condition or status. It would be poor consolation, however, to a jitney load of persons, who are negligently injured by the careless operation of a jitney driver, to be told that the jitney was permitted to run or be operated, without security being given to the public, for the reason that the owner was unable financially to do so, and that he was permitted to operate his vehicle simply because he was a citizen and had a right to be upon the street with it.

The streets, as we have seen, are primarily for public travel; but every community is interested, and must necessarily be interested, in preserving life and limb upon the public streets; and no vehicle will be permitted to run at such a rate of speed as will endanger the life or the property of any citizen, and therefore the character of the men who operate those vehicles must necessarily be inquired into.

The claim that it is unreasonable to say that a driver of a jitney shall understand the English language, is nonsensical and foolish. The English language, whatever its origin may have

been, is the language of the United States and the American people; and it is no hardship to any man who desires to do business with the American public to require of him such a use of the English language as will enable him to intelligently communicate with those with whom he is doing business.

The Cleveland Railway Company of this city is not concerned with the jitney, as the latter can not compete with three-cent fare; and the field of the jitney in Cuyahoga county will be, and of necessity must be, in the country or interurban districts; and it should be given a fair chance, and all privileges consistent with public safety should be accorded it; but, in return, it should be subject in all respects to the law governing common carriers so far as the transportation of passengers is concerned, and it should be subject to municipal control so far as the use of streets is concerned.

The statutes of this state make it mandatory upon the municipalities to keep their streets open and free and clear from nuisance; and one can readily understand how a jitney bus may become a public nuisance under certain circumstances, so that the necessity for regulation will appeal to any man or ordinary common sense.

For the reasons indicated, the writ will be denied, and the petitioner remanded.

1915.]

Klaussen v. Purcell.

**EMPLOYER WHO DISCHARGES A GUARDSMAN
LIABLE IN DAMAGES.**

Common Pleas Court of Cuyahoga County.

MARTIN KLAUSSEN V. JOHN PURCELL.

Decided, March 19, 1915.

National Guard a Constitutional Force—Joint Maneuvers Thereof Prescribed by Law—Employer Who Discharges a Member of the National Guard for Attending Maneuvers Liable in Damages.

1. The National Guard, which is the modern designation of the organized, equipped and disciplined portion of the militia, is recognized by the federal and state constitutions and statutes as a necessary arm of the government, and is a constitutional force.
2. For drill and discipline, camps of instruction of the Ohio National Guard are prescribed by state law, and for the purpose of obtaining proficiency and uniformity therewith, joint maneuvers with the regular army are prescribed by federal law; and when so ordered, the attendance of an enlisted man of the Ohio National Guard thereat is compulsory.
3. A janitor of a public high school who discharged an assistant janitor who was a soldier of the National Guard of this state, for attending such maneuvers at Fort Benjamin Harrison, pursuant to orders from both the War Department and Adjutant-General of the state, which he was bound to obey, is answerable in damages.

Turney & Sipe, for plaintiff.

Thos. C. Brinsmade, contra.

NEFF, J.

It appears that the facts in this case are as follows:

The defendant, John Purcell, was a janitor of one of the public schools of the city of Cleveland. The plaintiff was an assistant janitor, assigned to duty at the same school and subordinate to the defendant. The defendant had the authority to employ and discharge such assistants at this school.

The plaintiff is a citizen of the United States, and the state of Ohio, and at some time prior to the 13th of September, 1914, was a soldier of the Ohio National Guard. On that day he was ordered by his superior officers to attend a tour of duty with his

regiment at Fort Benjamin Harrison, Indiana, at which place a joint maneuver was being held, participated in by soldiers of the Ohio National Guard and the regular army.

It appears that the defendant was displeased at the military connection of the plaintiff, and exercised his authority as janitor of this school by having the plaintiff discharged from the employ of the board of education by reason of his having attended the military duty so imposed.

This action is one in damages for this dismissal, averred to have been wrongful, and a jury being waived, the questions of law and fact are submitted to the court.

It appears that early in the history of our commonwealth the necessity of the militia, which is now by modern designation the National Guard, was recognized. The second amendment to the Constitution of the United States reads as follows:

“A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.”

Now, it appears that Congress has, by legislation, pursuant to the authority vested in it by another constitutional provision, in part provided for the organization, armament and discipline of the National Guard. By the act of January 21, 1903, Congress assumed general jurisdiction of the National Guard. One of the sections provides as follows:

“The Secretary of War is hereby authorized to provide for participation by any part of the organized militia of any state or territory, on the request of the governor thereof, in the encampment maneuvers and field instruction of any part of the regular army at or near any military post or camp or lake or seacoast defenses of the United States. In such case the organized militia so participating shall receive the same pay, subsistence and transportation as is provided by law for the officers and men of the regular army, to be paid out of the appropriation for the pay, subsistence and transportation of the army; provided, that the command of such military post or camp and of the officers and troops of the United States there stationed shall remain with the regular commander of the post without regard to the rank of the commanding or other officers of the militia temporarily so encamped within its limits or its vicinity.” Section 15, act of January 21, 1913. (32 Stats., 777.)

1915.]

Klaussen v. Purcell.

It appears that the plaintiff was ordered out to duty at such joint maneuvers pursuant to the provisions of this statute, and that his obedience to the order issued in such case was the cause of his discharge.

Article IX, Section 1 of the Constitution of Ohio provides as follows:

“All male citizens, residents of the state, being eighteen years of age, and under the age of forty-five years, shall be enrolled in militia, and perform military duty, in such manner, not incompatible with the Constitution and laws of the United States, as may be prescribed by law.”

By the act of April 23, 1904 (97 Ohio Laws, 477), it is provided that the militia so defined in the Constitution would be divided into two classes, one the National Guard, and second, the unorganized militia. The same act provides for compulsory draft of members of the second into the first.

The question, therefore, resolves itself to this: The plaintiff having, by his voluntary act, elected to place his services at the disposal of the state and nation, for the public defense, may he be penalized or discriminated against by reason of his act?

Clearly, one who voluntarily undertakes a dangerous and burdensome service from motives of pure patriotism, should not be placed, by reason thereof, in a position less favorable than he who, although liable to the same service, does not undertake it.

It appears that in some states employers are prohibited by law from taking such action as was here taken, and a penalty is attached to the violation of the prohibition, while the laws of Ohio are silent in this regard. Yet this is a civil case for damages, and not a penal action. The legal rights of the plaintiff having been violated, and an actionable wrong done him, judgment should, therefore, be rendered in his favor.

Upon the question of the amount of damages, it appears that the young man experienced no extreme difficulty in obtaining new employment upon his return. The loyal and patriotic young American citizen who volunteers his service to the state and nation is usually a good citizen, and is rarely long found in the ranks of the unemployed. His damages are, therefore, nominal, yet in a case of this kind judgment should be for a substan-

tial sum, that the defendant may not regard the matter as one of no particular consequence.

Judgment will be awarded in favor of the plaintiff and against the defendant in the sum of \$100 and the costs of this action.

CREATION OF BONDED INDEBTEDNESS BY MUNICIPALITY.

Common Pleas Court of Williams County.

J. H. SCHIEBER V. VILLAGE OF EDON.

Decided, 1914.

Municipal Corporations—Can Not Sell Bonds Without a Vote of the Electorate—The Ten Mills Limitation—Construction of Section 5649-2, General Code.

1. Section 5649-2, General Code, repeals by implication the authority vested in a municipal council to sell bonds without a vote of the people as provided in Sections 3939, 3940 and 3941, General Code.
2. The ten mills limitation provided in Section 5649-2, General Code, constitutes annual spending money for the several taxing districts, and a municipality is without authority to sell bonds and create a debt which must be paid out of this annual spending money.
3. Only by a vote of the people can a bonded indebtedness be created against a municipality.

R. L. Starr, for plaintiff.

In May, 1914, the village of Edon, Williams county, passed a resolution declaring it necessary to pave certain streets, and in June, passed a paving ordinance in accordance with the resolution.

The village then advertised for the sale of \$5,200 of bonds of the village to pay for its part of the cost of the proposed paving without submitting the bond issue to a vote of the people. The bonds were advertised to be sold in July.

The plaintiff, a tax-payer, instituted an injunction suit to prevent the sale of the bonds, and temporary restraining order was granted.

1915.]

Schleber v. Edon.

SCOTT, J.

May 15, 1911, the General Assembly of the state passed the act which is now Section 3939 of the General Code, which in part reads as follows:

“When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, and at such rate of interest not exceeding six per cent. per annum, as said council may determine and in the manner provided by law, for the following specific purposes: for resurfacing, repairing or improving any existing street or streets, as well as any other public highways.”

April 16, 1913, the General Assembly of the state enacted Section 5649-2, General Code:

“Except as otherwise provided in Sections 5649-4 and 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district, shall not in any one year exceed ten mills on the dollar of the tax valuation of the taxable property, in such county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness that may hereafter be incurred by a vote of the people.”

Then follows other sections relating to the creation and duties of the budget commission.

The state of the record in this cause is such as to eliminate all questions presented, save one, and that is: Is Section 3939, General Code, in conflict with Section 5649-2, and if so does the doctrine of repeal by implication apply?

Section 7629, General Code, passed April 16, 1904 (97 O. L., 358), provides in substance for the issuing of bonds by boards of education for the purpose of paying the cost of obtaining school house sites and the construction of school buildings, without the vote of the people of the district.

In the case of *Rabe v. Board of Ed.*, 83 Ohio St., 403, the Supreme Court, on September 30, 1913, construed Section 5649-2,

General Code, in connection with Section 7629 and held that the latter section was repealed by the former by implication. The first paragraph of the syllabus is as follows:

"Sections 5649-2 to 5649-5a, General Code, inclusive, limit the rate of taxes that can be levied in any taxing district for any and all purposes. Any statutes existing at the time of the passage of these sections, in direct conflict therewith and not specifically repealed thereby, are repealed by implication."

The Legislature recognizing the far reaching effect of this decision in its limitation upon the power of a village council, and other tax spending bodies, to create debts without a vote of the people, and to legalize prior bond issues, on February 16, 1914, enacted that:

"All bonds heretofore issued by any political subdivision for a lawful purpose which have been sold for not less than par and accrued interest and the proceeds thereof paid into the treasury, shall be held to be legal, valid and binding obligations of the political subdivisions issuing the same."

In the emergency section of this act is found the reason for its passage as follows:

"Such necessity arises from the fact that many public improvements are in course of construction and can not be completed except by the issue of bonds, that by a recent judicial construction a doubt has arisen about the power (without a vote of the people) to issue bonds which would cause delay in the completion of said public improvements, which completion is necessary to the public health and safety."

In the light of and guided by the rules laid down in *Rabe v. Board of Ed.*, *supra*, our conclusion is that Sections 3939, General Code, *et seq.*, are in conflict with Sections 5649-2, *et seq.*, and that said former sections are repealed by implication.

The temporary injunction heretofore allowed herein is made perpetual, at the costs of the defendant.

1915.]

State, ex rel, v. Green et al.

**BIDS FOR USE IN THE ALTERNATIVE OF VARIOUS MATERIALS
AND METHODS OF CONSTRUCTION.**

Superior Court of Cincinnati.

STATE OF OHIO, ON THE RELATION OF CHARLES F. WALTZ, v.
JAMES A. GREEN, ET AL, COMPOSING THE NEW COURT HOUSE
BUILDING COMMISSION FOR HAMILTON COUNTY, AND
THE CHARLES McCaul COMPANY.*

Decided, May 5, 1915.

*Building Commissions—Award of Contract for a New Court House—
Bidding in the Alternative—Individual Laches of a Tax-Payer Seek-
ing to Enjoin Performance of a Public Contract—Not a Bar to His
Suit in the Representative Capacity of a Tax-Payer—Sections 2333,
2338 and 2355.*

1. A court house building commission constituted under the provisions of Sections 2333, 2338, General Code, inclusive, is governed by the provisions of Section 2355, General Code, requiring contracts to "be awarded to and made with the person who offers to perform the labor and furnish the materials at the lowest price." The decision in *Mackenzie v. State*, 76 O. S., is abrogated by the subsequent amendment of Section 2338, General Code.
2. Where the controlling statute requires public contracts to be awarded to the lowest bidder, specifications are valid which call for bids upon the use in the alternative of various materials and methods of construction, and the final adoption of alternatives may be reserved until all bids have been opened and computed. *State v. McKenzie*, 9 C.C.(N.S.), 105, not followed.
3. One who sues as a tax-payer to enjoin the performance of a public contract on the ground that the specifications therefor are invalid is not estopped by the fact that as an advocate of unsuccessful bidders he endeavored to procure for them the award of the contract; nor because of such fact will his suit be dismissed on the ground of a total want of good faith. As such tax-payer sues in a purely representative capacity his action is not barred by individual laches, notwithstanding the alleged invalidity of the specifications might have been known to him three months before the institution of suit, and in the interim large public expenditure has been in-

*Affirmed by the Court of Appeals, *State, ex rel, v. Green et al*, 22 C.C. (N.S.), 1; motion to require the Court of Appeals to certify its record overruled by the Supreme Court June 4, 1915.

curred and important public interests have become involved upon the faith of such specifications.

Kinkead & Rogers and Galvin & Galvin, for relator.

John V. Campbell and Chas. A. Groom, Prosecuting Attorneys,
for Court House Building Commission.

Pogue, Hoffheimer & Pogue, for the McCaul Company.

MERRELL, J.

This is an action brought on the relation of Charles F. Waltz, as tax-payer, against James A. Green and others, constituting the new court house commission for Hamilton county, and the Charles McCaul Company. The commission has entered into a contract with the McCaul Company, a Philadelphia concern, for the construction of a new court house for Hamilton county, and the contractor has entered upon the work of the construction. The relator seeks to enjoin further proceedings under the contract and to have the contract declared invalid on the ground chiefly that bids were called for upon alternative specifications. It is the relator's position that the building commission was obligated by law to award the contract to the lowest bidder, and that inasmuch as the commission did not determine which alternatives it would select until after the bids upon every possible alternative were opened and examined, it was impossible that there should be in the legal sense an award to the lowest bidder.

Before considering this question, which is fundamental in the case, it must be determined whether the relator is entitled to maintain this action. The defendants, the building commission and the McCaul Company, have filed separate answers, differing in form but substantially similar in presenting certain defenses. These defenses are that the relator by his conduct pending the consideration of bids submitted, has estopped himself to attack the contract actually entered into; that he is guilty of *laches*; that though in fact a tax-payer, he brings this action not as a tax-payer, but as the representative, so to speak, of disappointed bidders, and that consequently his appeal to this court of equity is not in good faith.

It appeared in evidence that the relator is the active official of an association of building contractors, a number of the mem-

1915.]

State, ex rel, v. Green et al.

bers of which were bidders upon part or all of the work of constructing the new court house; that when the bids were opened the relator was persistent and zealous in endeavoring to secure the award to Cincinnati bidders with whom he was to some degree associated; that he attended nearly all the meetings of the court house commission, and both by written and oral argument importuned the commissioners in the interest of securing the award to local bidders. It further appeared in evidence that certain of the Cincinnati bidders, members of the association of which Waltz is the executive officer, had either promised to contribute to a fund for the prosecution of this suit, or had at least expressed a willingness to do so if called upon.

Upon the situation thus disclosed it might with reason be thought that the relator has occupied inconsistent positions with respect to the building contract here in question, having at first sought an award of that contract to those he represented, upon the theory that such award would be a valid one, and failing to secure the award as desired, is seeking now to contest its validity. Again the support, moral and possibly financial, given the relator by certain unsuccessful bidders suggests a doubt as to whether the interest of the tax-paying body was the sole or even the chief incentive for the institution of this action. Notwithstanding these appearances, I am of the opinion that the relator is not estopped to be heard in this action, nor are his rights as a tax-payer invalidated. The relator's activity in seeking the award of the contract to those he represented does not work a technical estoppel to question the validity of the contract entered into, and his private interests, if such he has, can not be taken to overshadow or eliminate the rights of the tax-payers generally whom he has assumed to represent.

On the question of what extent of good faith will be required of the relator in a tax-payer's suit, counsel on both sides have commented extensively upon the authorities in this state. In the view I take of the authorities a detailed examination of them would be beside the point. Undoubtedly a court of equity will reserve the right to refuse a hearing to one who sues in the guise of the public-spirited citizen while in truth being nothing more than the instrument of some special interest, possibly in-

imical to the general good. On the other hand to refuse the suit of a tax-payer merely because the individual relator happens to have a private or special interest in the subject-matter of the suit would in practice amount to a repeal of the statute authorizing the individual tax-payer to vindicate the public interest in the courts.

There is no substantial conflict in the decided cases upon the question here considered and I content myself with the mere statement of the conclusion here reached that the relator is not estopped to maintain this action, nor is he debarred by a total want of good faith.

On the other hand, the defense of *laches* is one that, upon the facts in evidence, requires serious consideration. On December 11th, 1914, almost four months before this action was begun, the building commission adopted plans, specifications (including alternatives) and estimates of the cost of the proposed structure. Bids were invited upon these precise specifications, and proposals were received and opened on February 16th, 1915. On March 16th, after careful computation of bids, and after much discussion in which relator took a leading part, the commission made its selection of alternatives and awarded the contract, which was actually executed April 1st, 1915. On April 3d, the relator requested the prosecuting attorney to institute this action, and the request being refused, this suit was filed April 6th, 1915.

In this action, it should be noted, the relator seeks to compel the rejection of all bids, upon the ground that the specifications, publicly adopted more than three months before, are not in compliance with the statute law. It might well be thought, therefore, that the relator's delay under the circumstances, large sums of public money having in the meantime been expended for advertising and in other ways, should debar him from maintaining this action. The suggestion of counsel that relator could not know, until the contract was actually signed, whether the building commission would persist in its attempted procedure, is technical rather than substantial.

However, notwithstanding the considerations thus outlined, I do not base my decision upon the defense of *laches*, and in this I am in a measure sustained by the decision in *State, ex rel, v.*

1915.]

State, ex rel, v. Green et al.

Cass, 13 C.C.(N.S.), 419, and by the broad scope of Section 2921 and Section 2922 by favor of which this action is brought. Moreover, it must be borne in mind that in the present suit it is not the interest of an individual that is sought to be vindicated, but the rights of all tax-payers of the county. Those rights, whatever they may be, may not be put aside because of an infirmity in the position of the particular tax-payer who as relator assumes to represent the public interest.

I come, therefore, to the consideration of the substantial issues in the case. These I have already indicated, but they should perhaps be stated more fully.

The specifications for the general construction of the court house are elaborate and apparently carefully prepared. They were drawn so as to permit of the reception of lump bids upon the entire construction or bids upon one or more branches of the work. Moreover, bids were called for based upon alternative methods of construction or the use of alternative materials in several important features of the construction. Thus, bids were invited for the construction of the entire building of granite, or, in the alternative, for the use in the superstructure of marble, sandstone or limestone. Intending bidders were also invited to give estimates for furnishing revolving doors for the various chief entrances, or in the alternative, for swinging doors. And, again, estimates for the construction were asked for including the use of fire prevention screens at the intersection of corridors, or in the alternative, omitting such screens. A further alternative about which much discussion has centered was one whereby the bidder is asked to make his estimate inclusive of the demolition of the old court house, or in the alternative, excluding the work of demolition.

Not until after the bids had been received upon all the alternatives referred to and others, and not until after computations had been made of the various bids figured upon the use in one case of certain alternatives, in another case of other alternatives, did the commission determine which alternatives it would select. It is contended on behalf of the relator that this course of procedure is contrary to law and invalid for the reason that it opens the door to favoritism or collusion between the commission and

intending bidders, in that the commission by the choice of one set of alternatives rather than another set might bring about the success of a certain bidder or group of bidders and the defeat of other bidders or sets of bidders. It is the contention that the statute law governing the building commission requires the award to be made to the bidder or bidders offering to do the work of construction at the lowest price and that where the choice of alternatives is reserved to the commission until after all bids have been submitted and computed, there can be in a mathematical sense no determination of the lowest bidder, and the making of any award necessarily lies in the whim or independent judgment of the building commission, exercised quite apart from the determination of who is the lowest bidder. Otherwise expressed, the argument is that under the method of award thus described, it is possible for the building commission by the choice of alternatives, to make "low" any bidders or bidders whom they desire to select.

At this point it should be said that no charge or suggestion is made of favoritism on the part of the building commission or its members. The questions here involved are almost exclusively questions of law, it being contended on the part of the relator that the building commission is by law required to award the contract to the lowest bidder, and by the defendants (first) that under the statutes applicable, the commission is not so restricted in making its award, and (second) that even if so restricted, the commission did award the contract to the lowest bidder within the meaning of the statute law.

It is admitted by the relator that the successful bidder, the McCaul Company, was low upon the alternatives (of construction and material) finally adopted by the building commission, but the position is taken that the specifications calling for alternative bids are not in conformity to law and that the contract should be re-let upon new specifications from which all alternatives must be eliminated.

The first question to be determined is, therefore, by what provisions of the statute law the building commission is controlled.

The building commission is composed of the three elected county commissioners and four freeholders of the county, ap-

1915.]

State, ex rel, v. Green et al.

pointed by the common pleas court. Where it has been decided to erect a court house costing more than \$25,000 such body—the building commission—is the only one empowered to plan, contract for and carry out the construction of the building. The legislation under which the building commission is constituted was enacted in 97 Ohio Laws, 111, amended in non-essential detail in 98 Ohio Laws, 53, and found in Sections 2333-2338 inclusive, of the General Code. The gist of that legislation is contained in Section 2338, General Code, as follows:

“After adopting plans, specifications and estimates, the commission shall invite bids and award contracts for the building, and for the furnishing, heating, lighting and ventilating it, and for the sewerage thereof. Until the building is completed and accepted by the building commission, it may determine all questions in connection therewith *and shall be governed by the provisions of this chapter relating to the erection of public buildings.*”

The chapter in which Section 2338 is found is under the title of “Public Buildings” and bears the sub-title of “Building Regulations.” The earlier sections of the chapter are devoted to state buildings, a further grouping of sections relates to county buildings and bridges, and the final sections come under the sub-heading of “General Provisions.” Sections 2333-2338 inclusive, comprise a re-statement or codification of the court house building commission act. Subsequent sections of this chapter relate to county bridges, to the building of infirmaries, children’s homes, and court houses costing less than \$25,000. By Section 2355, originally applicable exclusively to the construction of public buildings by the county commissioners, it is provided:

“Such contract, so far as it relates to public buildings or bridge sub-structures shall be awarded to and made with the person who offers to perform the labor and furnish the materials at the lowest price.” * * *

It is the contention of the relator, and this contention is fundamental to the case, that the provision of Section 2355 just quoted is mandatory upon the building commissioners, being incorporated in the court house building commission law by the

final clause of Section 2338 above italicized. The statute authorizing and governing the court house building commission as originally enacted in 97 Ohio Laws, did not contain the clause referred to, and under the law as originally enacted the court house building commission possessed a wide and almost unlimited discretion and was not bound to award the contract to the lowest bidder, nor even to that bidder who was lowest and best. This was squarely determined by the Supreme Court in the case of *McKenzie v. State*, decided June 4th., 1907, and reported in 76 O. S., 369, reversing the Circuit Court of Cuyohoga County which, in the same case, reported in 9 C.C.(N.S.), 105, had held that the building commissioners were subject to the general provisions of the chapter relating to public buildings, and in particular to the requirement of the present Code, Section 2355, requiring the contract to be awarded to "the person who offers to perform the labor, and furnish the materials at the lowest price."

In the case at bar the position is taken on behalf of the building commission that the powers of the commission are such as they were adjudged to be in the *McKenzie* case in 76 O. S., and that the clause added to Section 2338 to the effect that they "shall be governed by the provisions of this chapter relating to the erection of public buildings of the county" is no more than an unauthorized interpolation by the codifying commission inadvertently enacted into law by the General Assembly in the passage April 2d, 1906, of Senate Bill No. 2, otherwise known as the General Code. In support of this position it is argued that the final clause of Section 2338 is incompatible with and repugnant to the earlier provisions of the same section. Thus it is said that the original wording of Section 2338 and the original wording of the independent Building Commission Act, 97 Ohio Laws, conclude as follows:

"Until the building is completed and accepted by the building commission it may determine all questions connected therewith."

This language was given a definite and final construction by the Supreme Court in the *McKenzie* case, 76 O. S., and that interpretation and construction (it is contended) will continue to be the meaning of the law so long as the same words remain unre-

1915.]

State, ex rel, v. Green et al.

pealed on the statute books; that as so construed by the Supreme Court, the building commission was not controlled or limited by other provisions of the statute requiring an award to the lowest bidder, but might, if it chose, award to the highest bidder. As said by the Supreme Court:

“The building commission must in some way resort to competitive bidding because it is required to invite bids; but it is not said or implied that the commission must conform to the procedure described for the county commissioners under like circumstances. * * * It is not said or intimated that the contracts must be awarded to the lowest or to the lowest and best bidder.”

It is urged with much force that in the case at bar this court is concluded by the construction of the Supreme Court in the McKenzie case, and that the addition to the building commission law (the last clause of Section 2338) is to be regarded as a mere legislative inadvertence.

Upon the oral argument of this case I was somewhat inclined to this view but upon reflection I consider it untenable.

The final clause of Section 2338 constituting new matter enacted by the General Code discloses no necessary inconsistency between the law governing the building commission and other provisions of the law governing the erection of public buildings by county commissioners. When it is said by the Legislature, as it was said, that the building commission, although empowered to determine all questions connected with the building, shall nevertheless be governed by other provisions of the statutes relating to the erection of public buildings, the unlimited discretion theretofore entrusted to the building commission was qualified so as to regulate its proceedings by other sections of the chapter on building regulations applicable to the erection of a court house. Sections of the chapter applying solely to the erection of bridges, of county infirmaries and of children's homes are manifestly of no concern to the court house building commission and in nowise limit its procedure or authority. Other provisions, however, having to do with the erection of court houses by county commissioners might be made part of the law governing the building commission if the Legislature, by apt language, chose to make them so.

When the McKenzie case was decided in 76 O. S., the Legislature had enacted the court house building commission statute, 97, Ohio Laws, 111, but had not sought by reference or in any manner to incorporate in that law the general provisions of the Revised Statutes. The Supreme Court accordingly refused to do by implication or construction what the Legislature had failed to do. The court speaking through Davis, J., said:

“Certainly the rule can not be invoked to read into the later act whole sections of former acts when there is no intimation of such an intent on the part of the Legislature; for it is to be presumed that the Legislature knew the existing law and it was the easiest thing possible, if it were intended that this building commission should be controlled by the existing law, to have so said without otherwise defining the powers and duties of the commission.”

The enactment of the General Code, including Section 2338, in its present form was subsequent to this expression of the Supreme Court, and for aught that appears, the concluding language of the section may have been in response to the intimation of the Supreme Court. The question here considered later arose in the case of *State, ex rel, v. Cass*, 13 C.C.(N.S.), 449 wherein a contract let by the court house building commission of Cuyahoga county was sought to be enjoined for the failure of the commission to award the contract to the lowest bidder.

The circuit court among other grounds, held that the building commission of that county possessed the wide discretion given it by the original building commission act under the construction of the McKenzie case, notwithstanding the adoption in the meantime of Section 2338 of the General Code in its present form. This conclusion, however, was reached upon the sole ground that the court house commission had been constituted prior to the enactment of the General Code and that the construction by it of the new court house, commenced before the enactment of the Code, constituted a *pending proceeding* within the meaning of Section 26 of the General Code making the amendment of Section 2338 inapplicable. This conclusion on the ground last stated was made the specific basis for the affirmance of the case by the Supreme Court. Although the difficulty, and I may say,

1915.]

State, ex rel, v. Green et al.

danger, of construing the law of Ohio upon the basis of the affirmance without report of the lower courts by the Supreme Court is generally recognized by the bar, I nevertheless feel that the journal entry in the Cass case, 84 O. S., 433, is authority for the conclusion here reached.

Moreover, while I permit myself to doubt whether there ever existed an affirmative legislative intent to qualify the building commission law by making the commission subject to general provisions of the statutes relating to public buildings, yet I am unable to find in the last clause of Section 2338 matter so incompatible with or so repugnant to the prior provisions of that section as to justify a judicial repeal of the clause referred to.

This conclusion is apparently in accord with the reasoning of Judge Hunt in *State, ex rel Green, v. Edmondson*, 23 O. D., 85 at p. 91, where it is said:

“Such clause (the last of Section 2338) is a recognition and acceptance of their (the building commission’s) independence, as established by the case of *McKenzie v. State*, because if for the the purpose of building a court house the building commission were merely a changed form of the body known as the county commissioners, or the appointed members were simply auxiliary to the county commissioners as claimed, such provision of the General Code would have been entirely unnecessary, the county commissioners, without such provision being governed by the provisions relating to the erection of public buildings.” * * *

It follows from the view thus expressed, if that view be sound, that the court house building commission of Hamilton county is controlled in its proceedings by the general provisions of the chapter upon building regulations so far as those general provisions are applicable to the erection of a court house. Among those general provisions so applicable is that of Section 2355 requiring the contract to “be awarded to and made with the person who offers to perform the labor and furnish the materials at the lowest price.”

Thus in the present case the question is squarely raised whether the award of the contract for building the new court house to the McCaul Company was an award to the lowest bidder, or whether, as contended by the relator, the method of receiving bids and

making the award was such that the lowest bidder could not be determined. As the McCaul Company's bid was admittedly the lowest upon the alternatives finally adopted, the question thus presented finally becomes nothing more nor less than the question of whether or not alternative bidding is permissible under statutes requiring contracts to be awarded to the lowest bidder.

The argument on this score advanced in behalf of the relator has already been sufficiently stated. This argument—that there can be no determination of the lowest bidder unless there be a prior determination of the precise form of construction exclusive of alternatives—is thought to find support in the provisions of Section 2343, as follows:

“When it becomes necessary for the commissioners of a county to erect or cause to be erected a public building, or sub-structure for a bridge, or an addition to or alteration thereof, before entering into any contract therefor or repair thereof or for the supply of any materials therefor, they shall cause to be made by a competent architect or civil engineer the following: full and accurate plans showing all necessary details of the work and materials required with working plans suitable for the use of mechanics or other builders in the construction thereof, so drawn as to be easily understood; accurate bills, showing the exact amount of the different kinds of material, necessary to the construction, to accompany the plans; full and complete specifications of the work to be performed showing the manner and style required to be done, with such directions as will enable a competent builder to carry them out and afford to bidders all needful information; a full and accurate estimate of each item of expense, and of the aggregate cost thereof.”

It is contended that specifications providing for the use in the alternative of different materials or different forms of construction do not constitute “full and complete specifications,” nor can an estimate contemplating the adoption of one of several alternative proposals be regarded as a “full and accurate estimate of each item of expense and of the aggregate cost thereof.” Furthermore it is suggested that where the choice of alternatives is left open that “accurate bills showing the exact amount of the different kinds of material” can not be, or at least, are not made. Finally, assuming these points to be established, it is pointed

1915.]

State, ex rel, v. Green et al.

out that the statutory preliminaries to the making of a public contract can not be avoided or waived by any or all parties to the proceeding and that a contract for public work entered into without the observance of statutory prerequisites is absolutely void. As to this latter point many cases are cited which will not be referred to because they are familiar and because the necessity in this state of a complete observance by public bodies of every statutory prerequisite to contract is well understood.

The argument against the validity of alternative bidding finds its chief support in the decision of the Circuit Court of Cuyahoga County in the McKenzie case already referred to. Syllabus 3 of that case is, in part, as follows:

“Before bids are invited for a public building the commission having the matter in charge must make the specifications so definite and certain as to material as to leave no discretion with the commission in the acceptance of the lowest bid.”

The court, acting upon this principle, enjoined the Cuyahoga county court house commission from entering into a contract for the reason, among others, that the commission reserved to itself the right to determine after opening the bids, whether limestone, sandstone or granite should be used in the construction. At p. 112 of the report in 9 C.C.(N.S.) the court says:

“In the matter of general materials for a public building no discretion as to the choice can lawfully be reserved until after the bids are opened, when the statute expressly requires, as it does here, that the specifications should be made in advance, and that the contract should be let to the lowest bidder. To hold otherwise would be to strike at the very root and foundation of these requirements of the statute. For if the law does not apply in letter and spirit to gross raw materials like these, what is left? The law forthwith becomes a dead letter.”

If the opinion of the circuit court in the McKenzie case, or so much of it as has been quoted is the law of Ohio, further discussion of the case at bar is entirely needless and the prayer of the relator for an injunction must be granted. The subsequent history of the McKenzie case has already been stated, though from a somewhat different point of view. The decision of the circuit

court was reversed by the Supreme Court upon the sole ground apparently that under the law as it then stood the building commission of Cuyahoga county operated under an independent statute and was not bound to award the contract to the lowest bidder in pursuance of other provisions of the Revised Statutes, notably that now numbered 2355 of the General Code. It is therefore contended by the relator here that the McKenzie case, having been reversed by the Supreme Court upon another and independent ground, is still the law of Ohio upon the point stated in Syllabus 3 above quoted, as to which the Supreme Court expressed no opinion. I can not accept this view. The decision in the McKenzie case by the circuit court was reversed by the highest court of the state and there is no presumption that because the lower court erred as to one ground of its opinion that it was correct in the other grounds stated by it which the Supreme Court did not think it necessary to review. Accordingly, I consider the opinion of the circuit court in the McKenzie case as of no higher authority than naturally attaches to the individual views of the able judges then sitting. Those views—upon the subject of alternative bids—are said to find support in the case of *Hertenstein, Tax-Payer, v. Herrmann et al*, 6 N. P., 93. In that case the board of water works commissioners of Cincinnati advertised for bids for embankment work under specifications which called for estimates upon items of dry paving and sodding, or in the alternative, for rip rap and sowing in grass. Upon one alternative a certain bidder was low, but upon the other alternative another bidder was low. After opening the bids the commissioners adopted dry paving and sodding and awarded the contract to the low bidder upon that form of construction, whose bid, however, was several thousand dollars higher than the low bid for rip rap and sowing. The following is from the opinion :

“It is contended that the board may advertise in the alternative form as to various classes of work to be done and materials to be furnished, and after the bids are received it may then finally determine what its specifications will be and award the contract to that bidder whose bid is found to be the lowest for the work according to the specifications adopted after the bids have been received. Such was the course pursued in this case.

1915.]

State, ex rel, v. Green et al.

"I am of the opinion that such a course violates both the letter and the spirit of the law."

This vigorous language of a former judge of this court would have great weight in the determination of the case at bar if it had been applied to facts at all analogous to those of the present case. Upon analysis, however, it will be found that the Hertenstein case affords no parallel in the present instance. In the Hertenstein case the water works board had adopted the specifications and approximate estimates of quantity of its engineer. The bidders were then asked to submit their figures for doing the work at so much per cubic yard or per lineal foot, and a computation of bids was had upon the basis of the engineer's approximate estimate of quantities. This practice is the one commonly followed with reference to similar work. What then occurred was this: The water works commission, after it had opened and computed the bids, changed the engineer's estimate of approximate quantities and by this process the contractor whose bid was low when computed by the original estimate of the engineer became high when that estimate was amended by the water works commission. This appears in the opinion of the court thus:

"Subsequently" (after the original computation of bids) "the board concluded that it would use a greater quantity of dry paving and sodding than it would use of rip rap and sowing in grass and thereupon awarded the contract to the David Folz Company."

The opinion of the court above quoted must be read therefore in connection with the exact facts of the case, and so considered, the views of the court would hardly be questioned today by any one. It is scarcely necessary to point out that in such form of bidding it is the engineer's approximate estimate of quantities which alone gives certainty in the computation of bids, so that a subsequent alteration in the approximate estimate necessarily destroys every element of competition in such bidding.

The Hertenstein case, therefore, is in no sense an authority against the validity of alternative bidding.

On the other hand the propriety and validity of calling for bids upon alternative specifications has repeatedly been deter-

mined in this state. *Ampt v. Cincinnati*, 17 C. C., 516, affirmed without report 60 O. S., 621; *State v. Toledo Board of Education*, 14 C. C., 15; *Polhamus v. Board of Education*, 21 C.C., 257, 259; *Emmert v. Elyria*, 6 N.P.(N.S.), 381, affirmed 74 O. S., 185. Numerous other authorities have been cited to the same effect.

The cases specifically mentioned above were all considered by the circuit court in the McKenzie case and in the language of the judges, gave them "pause." In the opinion, however, it was pointed out as it is in the present case urged in argument, that in every case in Ohio where alternative bidding was approved by the courts, one or both of two conditions obtained: either (1) the controlling statute permitted an award to the "lowest and best" bidder, thus conferring discretion; or (2) the subject-matter of the contract involved the use of material or machinery which was patented or of a proprietary character, or the work specified was of a non-competitive or partially non-competitive character.

These elements of possible distinction are indeed present in most if not all of the authorities referred to in Ohio. It remains to consider, therefore, whether the line of distinction suggested is a logical or valid one, and if so, whether the controlling statute in the present case warrants the application of such distinction to the facts of the case at bar.

Where by statute a public contract may be awarded to the "lowest and best" bidder, it is settled that officials empowered to contract may pass over the proposals of the lowest bidder or bidders and award to a higher bidder who may be determined to be better because of experience, responsibility or peculiar qualification for the work. The discretion conferred in such cases may be exercised whether the specifications are rigid or permit bids upon alternatives. The existence of such discretion is not therefore the *reason* for permitting alternative bidding. True, if the various bidders may present their own specifications, each bidder furnishing with his proposal his own plan of construction (as may be done by bidders upon bridge superstructures, Section 2345, General Code), it is impossible mathematically to determine the *lowest* of such bids, and in the nature of things, the award

1915.]

State, ex rel, v. Green et al.

can only be to the "lowest and best." But, if, as in the present case, all specifications including all possible alternatives are prescribed in advance by the contracting board or official, it is mathematically possible to determine the lowest bid upon any alternative or set of alternatives.

In the present case it is admitted that the bid of the McCaul Company is the lowest upon the group of alternatives finally decided upon by the building commission. The criticism advanced by the relator in this case of the method here followed, would be nearly if not quite as valid if the statute permitted the building commission to award to the "lowest and best." In the case last supposed it might be urged that the "best" bidder should be determined solely with reference to the experience, responsibility and availability of the bidder for the *particular* work proposed, just as the "lowest" bidder should be determined mathematically; and that to allow the commission after examining all bids to make one bidder "lowest" or "best" by selecting the alternatives upon which such bidder excelled, would be to violate the intent of the statute and put a premium upon favoritism.

Thus it seems to me that relator's contention goes to a question of public policy supposed to underlie the statutes relating to public contracts, rather than to the requirements of the statutes themselves. For there is no word in the statute law forbidding the use of specifications in the alternative. It was this conception of public policy which misled (as I think) the circuit court in the McKenzie case. That court, referring to decided cases in which alternative bidding was sanctioned, said:

"Shall we allow these precedents to emasculate the statute? Shall we swing wide the door of official discretion which experience teaches is too often but another name for graft and corruption? No corruption is charged or indicated in this case. But we are asked so to construe this section as to make it easy for dishonest officials to defraud the tax-payer. Probably no statute, however skillfully framed or wisely construed, can wholly prevent dishonest officials from following their bent. But graft can be made by law more difficult and dangerous and *the courts must be alert so as to construe such laws as to give them the effect intended.*"

A careful reading of the opinion in the McKenzie case will produce the impression that the learned judges read into the statute what they thought good morals and the public welfare demanded the statute *should* mean. In so doing, they were led, with deference I suggest, to an unconscious attempt at judicial legislation. Their construction of the statute requiring an award to the lowest bidder, has not received the affirmative sanction of the Supreme Court which has, on the contrary, by its affirmance of the Ampt case (*supra*) sanctioned, impliedly at least, a resort to alternative bidding.

On the question of public policy so far as it enters into the construction of this statute, and as to the admissibility of alternative bidding, the opinion of Cooley, J., in *Attorney-General v. Detroit*, 26 Mich., 263, merits intelligent approval:

"It is quite true that if, when the bids are in, council may reject one kind on the ground of its being less valuable than another, it must follow that the bids are not conclusive upon the right to a contract; but that a right in the council to determine the kind is more likely to be exercised from dishonest motives after the bids are in than it would be in deciding what bids should be received is not to my mind very apparent. On the contrary, the broader the door that is opened to competition, the greater will be the number of those who will be interested in watching the proceedings to see that just awards are made, and impartial judgments pronounced."

In the case referred to bids were asked for the construction of a sidewalk and proposals were invited for the use of various materials in the alternative. The statute required the contract to be let to the lowest responsible bidder. Because of the use of alternative specifications the contract was sought to be enjoined, and the case is therefore analogous to the case at bar. In the case of *Mayor of Baltimore v. Flack*, 64 Md., 107, the answer of the court will appeal to those experienced in public lettings:

"That such a method as that pursued in this instance may be open to the charge of being dominated by favoritism or of being corruptly manipulated may be true, but it is equally true and more likely that both favoritism and fraud will control if the material is secretly selected and the bids are confined to that one

1915.]

State, ex rel, v. Green et al.

material, since by inviting proposals for one particular thing or process, public officials necessarily exclude everything else which might have been substituted for the thing called for and there is no greater field for corruption and favoritism than secretly shaping proposals if in fact the city is in corrupt hands."

In *City of Connersville v. Merrill*, 42 N. E., 1112, alternative bidding was again approved. The following language of the court is altogether pertinent to the facts of the present case:

"There was no uncertainty in the material to be used so far as the bidders were concerned. Those bidders were put upon an equality and the city and the property owners had the benefit of competition on each brand or special kind of general material to be used."

The same point of view is taken inferentially, at least, in *Emmert v. Elyria*, 74 O. S., 185.

To the specifications for the Hamilton county court house, the language of Christiancy, J., in *Attorney v. Detroit (supra)*, has exact application:

"The notice, by referring to the respective specifications, gave an equal opportunity to all persons, not only to enter into competition with those seeking to contract for any *other* kind, but also (within the letter and spirit of the charter) to compete with all who chose to bid for any *one particular kind*."

From another point of view, it is interesting to observe that where, in a public letting, a material or machine is called for which is covered by letters patent or is of a proprietary nature, the courts not only sanction, but actually require alternative proposals, and to this end resort to the extraordinary remedy of injunction. Such was the recent determination of this court. See *Fischer v. City of Cincinnati*, 16 N.P.(N.S.), 369, and cases therein cited.

The distinction between patented and proprietary articles or materials on the one hand, and, on the other, what, in the McKenzie case, are termed "gross raw materials" is after all a distinction only of degree. Raw materials, even of the commoner sort, are often held in more or less exclusive ownership, and at any rate are capable of being "cornered." The same public

policy or judicial construction which *requires* alternative proposals for materials of the former class should not hesitate therefore to *permit* them in the case of the latter.

In the final analysis, moreover, judicial interpretation of statutes should not depend too largely on the determination of questions of public policy. The statute as the Legislature has written it is the law, and I find therein no prohibition, express or implied, of alternative bidding.

On the subject of alternative bidding some reference should be made to the provisions of Sections 2363 and 2364, General Code, requiring the invitation of separate bids for one or more branches of the work of construction. By the provisions of these sections, particularly Section 2364, the award of a branch contract may be made to the "lowest and best separate bidder." Where the statute contains such provision it seems to be conceded that alternative bidding is permissible. It is the contention of the relator that these sections of the statute are mandatory upon the building commission. If this position is well taken, as I think it is, an extraordinary situation would arise if the use of alternative specifications, with reference to lump bids upon the entire construction, were not permitted.

Certain specific criticisms of the specifications for the new court house and of the method followed in making the award remain to be considered.

Thus it is said that no separate or independent bid was solicited for the making of a plaster model of the building. This criticism is based entirely upon the failure to reserve a space in the bid sheets in which intending bidders might write their proposals. On this point, it is enough to point out that the omission amounts to but little more than a typographical error which deprived no bidder of the right he would otherwise have had. Moreover, the plaster model was purely incidental to the construction work and the commission has perhaps wisely rejected all bids therefor.

Objection is also made to the commission's failure to call for any lump bid for the entire work inclusive both of construction and mechanical equipment. In fact the specifications for the work of construction and for the mechanical equipment are contained in separate pamphlets, but bids for both portions of the

1915.]

State, ex rel, v. Green et al.

work were received simultaneously. The evidence, moreover, is to the effect that very few concerns in the United States, and possibly not more than one, are organized to undertake both the work of construction and that of mechanical equipment of a building of such magnitude. The course followed by the building commission was in this respect, therefore, not only proper but necessary.

A further objection of seeming substance is this: that the mandate of Section 2364 was violated by the commission's failure to invite separate bids for the demolition of the old court house, such work being claimed to be that of a "separate trade or kind of mechanical labor." At the time when the building commission had before it all bids for the construction of the new court house and for various branches of the work, the county commissioners had under consideration bids for the wrecking or demolition of the old court house as an independent undertaking. The specifications for the new court house called for bids in the alternative, inclusive and also exclusive of the demolition of the old court house. The building commission had not invited separate proposals for the work of wrecking the old court house. When the building commission finally adopted the alternative of including in the construction of the new court house the work of wrecking the old one, the bid of the McCaul Company was found to be lowest upon such alternative. However, it appeared in evidence without dispute that if the county commissioners had accepted the lowest bid made to them for wrecking the old court house and had turned the site over to the building commission free of the old structure and the building commission had thereupon awarded the construction of the new building upon the basis of the proposals made to it, excluding the work of demolition, the bid of the Bedford Construction Company plus the cost to the county commissioners of wrecking the old court house would have been low upon the aggregate work by some \$2,500. In such case, the advantage of the saving in the sum named would have gone to the county's general fund and no saving to the court house building fund would have resulted. Upon these facts is based the argument on behalf of relator that the actual award was not made to the lowest bidder, and it is contended that the

course adopted by the building commission, that of treating demolition of the old building as part of the masonry work of the new, was a course not open to the commission either in fact or in law. On the question of fact there was evidence tending to show that the work of wrecking an old building is that of a trade separate and distinct from the trade of masonry; on the other hand, there was evidence tending to show that where, as here, it was permissible to use, in the construction of a new building, material taken from an old building upon the same site, it is customary and proper, in a technical trade sense, to include the work of demolition in the specifications for masonry work. The evidence referred to is in seeming conflict only. When the work of wrecking a building is the sole matter in contemplation it is doubtless true that such work has come to be considered that of a specialized occupation, but where, as here, the work of wrecking an old building is purely incidental to the erection of a new one upon the same site, and where, as here, it is permissible to use material from the old as part of the masonry work of the new, it is entirely legitimate to include both kinds of work in the specifications for the single branch job of masonry. Moreover, although the building commission was by law obligated to award the work of construction to the lowest bidder after a computation requiring comparison of every lump bid and every aggregation of branch bids, the discretion always rested with the building commission to adopt that alternative which included as part of the construction of the new court house the demolition of the old court house. In this determination—the adoption of such alternative—the discretion of the building commission was absolute, and there is no intimation that such discretion was not exercised in good faith and wisely. For it was clear, upon the evidence, that had the building commission chosen to adopt that alternative of construction which omitted the demolition of the old court house, leaving the work of demolition to be awarded by the county commissioners upon the basis of the lowest bid made to the latter, that the apparent saving of \$2,500 to the taxpayers of the county would unquestionably have been more than overbalanced by the loss of many times that sum through inevitable delay, confusion between independent contractors and

1915.]

State, ex rel, v. Green et al.

expenditure incident to the occupation for a longer period of the temporary court house.

Finally, it is contended that the contract actually entered into with the McCaul Company was not sufficiently certain within the meaning of the statutes in that the building commission by the terms of the contract reserved to itself the right in the future to require the construction of revolving doors in place of the swinging doors contracted for, at an additional cost of \$9,500, and to include in the contract fire-proof screens at the intersection of corridors at an added cost of \$18,500. These reservations were made in view of expected changes in the building code, which in its present form forbids the use of revolving doors and requires the use of fire screens at the intersections of corridors.

Inasmuch as the building commission at the time of making its award foresaw the probability of future changes in the respects referred to, it would seem to any one at all familiar with building operations that the making of the reservations in question was an instance of commendable foresight on the part of the commission. Moreover, Section 2340, General Code, specifically provides for the making of changes in the construction during the progress of the work. I am at a loss to understand why the building commission should not do at the time of entering into the contract what it is authorized to do at a later time. It is common knowledge that a change in plans made after a building is partly constructed is apt to be much more expensive than if the possibility of alteration had been provided for at the outset. The reservation of the right to make future changes did not abrogate the commission's choice of alternatives as actually made. Hence there was no uncertainty in making the award.

With reference to the various grounds of objection last discussed, it is but fair to note that counsel for the relator refused to seek the judgment of this court upon any of these grounds considered independently and apart from the chief issues in the case. Counsel have thereby added dignity to their able argument and clarified the issue.

For the reasons stated the petition of the relator will be dismissed.

**LIABILITY FOR FIRE WHICH SPREAD FROM GASOLINE
EXPLOSION.**

Common Pleas Court of Morgan County.

CHARLES L. JOHNSON v. H. S. WALKER ET AL, ADMINISTRATORS.

Decided, April 19, 1915.

Claim for Damages for Loss from Fire—Tank of High Pressure Gasoline Explodes in Garage—Resulting Fire Spread to Adjoining Building, Which Was Destroyed—Owner of Adjoining Building, Suing for Damages, Must Aver and Prove Negligence.

1. It was not negligence *per se* for the owners of a garage to have nauled into their building a fifty-gallon tank of "high pressure" gasoline for automobile use in the retail trade, from which an explosion occurred while the owners of the garage were transferring the gasoline from the tank to another vessel.
2. Where, under such circumstances, the garage building is set on fire from the explosion, and the fire spreads and consumes the building on an adjoining lot, an action will not lie for damages resulting therefrom to the owner of said building, without his averring and proving negligence on the part of the owners of the garage in handling the gasoline. *Bradford Glycerine Co. v. Manufacturing Co.*, 60 Ohio State, 560, distinguished.

Lyne & Kuntz, for plaintiff.

Danford & Rogers, contra.

WEBER, J.

Heard on demurrer to petition.

The petition sets out, in substance, the following facts after averring appointment of defendants as administrators.

Plaintiff says that on and prior to August 16, 1914, he was the owner of a two-story frame dwelling-house situate on Main street in the village of McConnelsville, Morgan county, Ohio; that said dwelling-house was of the value of \$2,500 and was located adjacent to and just west of a building then and there occupied by and controlled by the Morgan County Garage Company.

1915.]

Johnson v. Walker.

Plaintiff further says that on August 16, 1914, Chester T. Walker and Frank B. Walker were engaged in partnership in the automobile garage business under the firm name of the Morgan County Garage Company, with their principal place of business on Main street in the village of McConnelsville, Morgan county, Ohio; that on August 16, 1914, the said partnership and its servants and employees, at about 3 o'clock P. M., caused to be hauled into said garage building on said Main street, in said village, a fifty-gallon tank filled with high pressure gasoline which had been procured by said partnership near Chesterhill, Morgan county, Ohio; that said gasoline had not been properly prepared for use for automobile garage purposes, but was what is commonly known as "high pressure gasoline," and said gasoline contained a much greater per cent. of gas than gasoline in ordinary use and sale for automobile purposes; and that said gasoline in said fifty-gallon tank was highly explosive and dangerous.

That on said date, while Chester T. Walker and Frank B. Walker and their servants and employees were upon said premises and engaged in said partnership business and while they were transferring said gasoline from said fifty-gallon tank, the said gasoline therein, from some cause unknown to plaintiff, exploded with great force and concussion, and thereby caused said automobile garage and building to burn and be consumed by fire. Plaintiff further says that said fire so kindled by said explosion of said gasoline, spread and extended to said two-story frame building of plaintiff and caused said building to burn and to be consumed and almost wholly destroyed, to plaintiff's damage in the sum of \$1,500, and for which amount he prays judgment.

The demurrer is general in form and questions the sufficiency of the petition.

No allegation charging negligence is made and plaintiff relies largely, if not wholly, on the law as declared by our Supreme Court in the case of *Bradford Glycerine Co. v. Manufacturing Co.*, 60 Ohio St., 560.

That is a case where an explosion of nitroglycerine occurred at place of storage while the nitroglycerine was being trans-

ferred from a wagon to the magazine, which was more than a mile from the premises of plaintiff which were injured by the concussion. In this case no act of negligence was charged or shown. The Supreme Court laid down the following propositions in the syllabus:

"1. Nitroglycerine is a substance usually recognized as highly explosive and dangerous, the storage of which at any place is a constant menace to the property in that vicinity. And one who stores it on his own premises is liable for injuries caused to surrounding property by its exploding, although he neither violates any provision of the law regulating its storage, nor is chargeable with negligence contributing to the explosion.

"2. A right of action will exist in favor of all property within the circle of danger, and the fact that the property injured was not on premises adjacent to those on which the explosive substance was stored, will not defeat a recovery."

The sole question, therefore, raised by the demurrer is: Must negligence on the part of the management of the garage be pleaded and shown by plaintiff in order that he may recover?

At first glance, and without an examination of the authorities bearing on the question, it would seem that plaintiff had brought himself within the rule laid down in the last mentioned case, as gasoline ordinarily and especially of the properties described in the petition is highly explosive and dangerous.

While there are a number of decisions in Ohio on the subject of explosives and highly dangerous substances, and liabilities growing out of explosions and injuries resulting from the storage and handling of the same, I find no case like the one at bar, and we must ascertain from the adjudicated cases whether or not there is a distinction or difference in the rule of liability between explosions of substances or compounds like nitroglycerine or gunpowder which are kept and used solely for their explosive properties, and those other highly dangerous substances or articles of commerce such as steam, gasoline and electricity, which have great commercial value for many other purposes.

The leading case on the subject is that of *Fletcher v. Rylands*, an English case decided in the Exchequer Chamber by Justice

1915.]

Johnson v. Walker.

Blackburn and later affirmed by the House of Lords and by that tribunal tersely stated as follows:

“If a person brings, or accumulates, on his land anything, which, if it should escape may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.”

As stated, our Supreme Court, in *Bradford Glycerine Co. v. Manufacturing Co.*, *supra*, has adopted and applied the above doctrine to the storage of nitroglycerine. The same rule was applied in the use of gunpowder in quarrying stone, where the buildings of an adjoining owner were destroyed. *Tiffin v. McCormack*, 34 Ohio St., 638.

The case of *Langabaugh v. Anderson*, 68 Ohio St., 131, is one in which a tank gave way containing oil; the oil ran under plaintiff's building and down a ravine, where it caught fire. The fire followed the track of the oil and consumed plaintiff's building, who sued for damages.

The court, in *Langabaugh v. Anderson*, reviewing the case of *Bradford Glycerine Co. v. Manufacturing Co.*, *supra*, p. 145, say:

“The difference between the storage of water, stone, crude oil and nitroglycerine, is marked and easily comprehended, and this point of difference applies in gunpowder cases and other cases arising out of injuries from explosives.

“The latter are at all times, in all places and under all circumstances, dangerous. They are made for their dangerous qualities, and are bought, sold and used as explosives, and hence the owner assumes at once the liability of their accomplishing natural and probable results. Not so as to crude petroleum.”

The court then briefly discusses the case of *Gas Fuel Co. v. Andrews*, 50 Ohio St., 695, which was an action to recover damages resulting from the escape of natural gas; in which it was held that the gas company was liable although not negligent in regard thereto, but calls attention to the fact that there had been a violation of the statute which imposed on the company the duty of keeping the gas under its control and that such holding was based on the statute.

And in commenting on the case of *Fletcher v. Rylands, supra*, Price, J., who delivered the opinion, p. 146, said:

"As yet, no decision of this court has adopted the entire scope of *Fletcher v. Rylands*, and while it holds in general a good and wholesome doctrine resting on good morals and sound reason, its application should be made with suitable and necessary limitations."

In *Armstrong v. Cincinnati*, 12 C.C. (N.S.), 76; *Armstrong v. Cincinnati*, no op., 82 Ohio St., 454, it seems to me that the Supreme Court, in a measure, recedes from its strong position taken in *Bradford Glycerine Co. v. Manufacturing Co., supra*, with relation to dangerous and powerful explosive substances, so far as their use in blasting is concerned, by its affirmation of the case in the circuit court, which approved the common pleas in its charge to the jury that:

"It is not negligence *per se* to use explosives for blasting, and a charge to the jury in an action for damages to property from blasting in the neighborhood is not erroneous, where the jury are told that 'the users of such materials, knowing their explosive power and their destructive tendency, are bound to exercise the highest degree of care in their use.'"

The circuit court in deciding this case gives mention that counsel for plaintiff in error rely on *Tiffin v. McCormack* and *Bradford Glycerine Co. v. Manufacturing Co., supra*, and then distinguishes between the case then under consideration and the Tiffin case by reason of the fact that there was a technical trespass in the latter, while the former case at bar was a suit for damages resulting from heavy blasts and explosions that caused plaintiff's house, cistern, etc., to tremble, crack open and become disintegrated. No distinction whatever is made in the Bradford Glycerine Company case save the constant menace to property in the vicinity by reason of its storage, and in fact the damages in the Armstrong case and the Glycerine Company case resulted from causes quite similar in nature, though not so sudden and direct in results.

Another viewpoint in cases of this nature is: Did the acts of defendant's decedents, in bringing in and handling in the

1915.]

Johnson v. Walker.

building gasoline as stated in the petition constitute in themselves, as against the rights of plaintiff, a nuisance *per se*? If so, then plaintiff has a right to recover and his petition is good without averring negligence. If not so, then negligence must be pleaded and proved. See note, *Henderson v. Sullivan*, 16 L. R. A. (N. S.), 691.

In *Whittemore v. Barter Laundry Co.*, 181 Mich., 564, the court say :

“We may grant that the storage of gasoline on premises adjacent to or adjoining the premises of another is not a private nuisance *per se*. It might, however, become such, considering the locality, the quantity and the surrounding circumstances, and would not necessarily depend upon the degree of care used in its storage.”

To like effect are the notes under this case, among them being a reference to *O'Hara v. Nelson*, 71 N. J. Eq., 161, in which it is said :

“That the storage of gasoline does not constitute a nuisance *per se*, and that whether or not it constitutes a nuisance at all depends upon the locality, the quantity and the surrounding circumstances, and the method and manner of keeping and use.”

But in considering the authorities outside our state and applying the test of nuisance *per se*, it must not be forgotten that *Bradford Glycerine Co. v. Manufacturing Co.*, *supra*, must control so far as it applies to the storage of dangerous explosives used for their explosive properties, notwithstanding the fact that our Supreme Court stands virtually alone in the extent to which it has applied the rule (16 L. R. A. [N. S.], 691, n.). Therefore, if the “high pressure gasoline” mentioned and described in the petition falls within the class of explosives in that case laid down, then the petition is undoubtedly good, otherwise, not.

The quantity of gasoline handled at the time of the explosion being small (only fifty gallons), it can not be seriously contended that it was brought there for storage purposes, but rather for immediate consumption by the retail trade. Notice or

knowledge on the part of defendants' decedents of the increased danger in handling "high pressure" gasoline is not averred.

I believe the case of *Marsh v. Railway*, 7 C.C.(N.S.), 405, is of material aid in the solution of this question. It is an electricity case and the main facts appear in the syllabus, which is as follows:

"1. The mere fact that electricity, generated by an electric railroad company, escaped from its trolley wire to one of its span wires; thence to a telephone cable of a telephone company; thence to a telephone cable of another telephone company; thence to a gas pipe in a store building; thence to the lead connection with a gas meter in the basement, which it melted off, igniting the gas, setting fire to the floor above and damaging a stock of goods, does not render all or any of said companies liable in damages to the owner of the goods, in the absence of proof of negligence on the part of one or more of said companies.

"2. Electricity is of a highly dangerous character, but of such common and recognized use in modern civilization that its use and keeping are sanctioned by law, and if injurious consequences flow from its use or keeping, negligence of the user or keeper must be shown to render him liable to one injured by an electric current.

"3. In the absence of a contractual relation between the parties, or of a statute regulating the matter, the doctrine of *res ipsa loquitur* applies only to the case of such highly dangerous things or agencies as are kept or used solely because of their highly dangerous character, and not to electricity, which is classed with steam rather than dynamite."

The circuit court in this case follows the rule and classification of explosives and other dangerous substances adopted in *Lanbaugh v. Anderson*, *supra*, as follows:

First, those cases in which a duty is imposed upon the defendant by reason of a contractual relation between the parties.

Second, those cases where a statutory duty has been violated.

Third, where the defendant is keeping or using a highly dangerous thing or agency which is liable to do harm to others if it escapes or is negligently used or handled.

Now, it is quite apparent that the case at bar falls neither within the first class nor the second. It belongs to the third.

1915.]

Johnson v. Walker.

“But,” says Winch, J., “we find here a distinction pointed out which requires a further classification or subdivision into those which are at all times in all places and under all circumstances dangerous; such as are made, bought, sold and used because of their highly dangerous character, as to which the owner assumes the liability of their accomplishing natural and probable results. And the other subdivision, those of a highly dangerous character, but yet of such common and recognized use in modern civilization that their use or keeping is sanctioned by law, and necessary in many departments of industry, as to which the courts hold that their use being lawful, if injurious consequences flow therefrom, negligence in their use must be shown, to render the defendant liable.”

This whole classification and subdivision of these dangerous agencies for the purpose of determining the liabilities of persons who choose to handle them, seem to me to be just and reasonable and in keeping with Ohio adjudications, so far as they have gone.

To which subdivision of the third class of cases, then, does gasoline belong?

It is not used as an explosive in the sense that nitroglycerine, gunpowder, dynamite and many other nitro-explosive compounds and forcible explosives are used and which belong clearly to the first subdivision.

The use of gasoline has become so common and its utility so generally recognized in the ordinary trades and commercial relations of life that it is looked upon and considered as important, perhaps, as steam, if not electricity. It is the great motive power now in use in the greatest war ever witnessed by mankind, both on land and in the air and also under the sea. It is found in use in almost every manufacturing establishment in our land. It is today used in 100,000 automobiles in Ohio. Its use as fuel is no longer considered a luxury, but a necessity. The comparative danger may be inferred from the fact that we have strict criminal laws controlling the handling and use of explosives falling within the first subdivision covering ten sections of the General Code (Sections 12533-12541) with heavy penalties for violations, while there are but two such sections

(Sections 12565-12566) applying to gasoline, benzine and naphtha with light penalties for violations.

We are living in a progressive age. The beauty and beneficence of our common law is its flexibility and adaptability, where required, to the conditions when applied. As stated by Judge Winch in *Marsh v. Railway, supra*:

“The law is growing from day to day, as industrial science is growing, so that what may now be considered in the first subdivision of this class, ten years from now, by reason of the advance of the arts, may belong to the second subdivision.”

As applied to the case at bar, may not this be literally true?

It therefore appears to this court that gasoline as a dangerous substance or agency falls within the second subdivision, above, and that negligence of defendants' decedents must be alleged and shown to create a liability.

But, it may be urged, that while this is true as to ordinary gasoline, the kind or quality described in the petition is more dangerous and that it therefore falls within the first subdivision. A sufficient answer is, first, it does not belong to the class or group of substances used exclusively for their explosive powers and properties; second, if it is taken from the second subdivision because of its “high pressure” and increasingly dangerous character, then courts are always at sea in the application of the law, for no matter how useful in the arts and trades and sciences the grade of gasoline in question may be, it will always remain an open question as to whether the particular gasoline in question was so highly volatile and dangerous as an explosive as to lift it from the class or subdivision where as ordinary gasoline it belongs and place it in the other group or subdivision. Many standards might thus be established and the law would remain unsettled. Better, rather, that the law of negligence be made the test and let the care in handling be commensurate with the danger involved.

The demurrer to the petition will be sustained.

1915.]

Krause v. Springfield.

NEGLIGENCE IN THE MANAGEMENT OF PUBLIC PARKS.

Common Pleas Court of Clark County.

CORA L. KRAUSE v. CITY OF SPRINGFIELD.

Decided, January 30, 1914.

Municipal Corporations—Liability of, for Negligence—In the Care of Public Parks—Injury to a Pedestrian on Defective Wooden Steps—Governmental and Proprietary Functions of Municipalities.

Where one is injured without negligence on his part by falling upon defective and dangerous steps in a public street in a public park owned by and within a municipal corporation, which had actual or constructive notice of the condition of said steps prior to and at the time of the accident, the person so injured may maintain an action against the corporation for damages on account of the injuries, notwithstanding said park had been devised to said corporation and accepted by it, the conditions of such devise as stated in the will of the testator providing that such park and certain funds also devised for its maintenance should be under the exclusive control and supervision of trustees appointed by the sinking fund commission of the corporation, and as regards said funds with the assistance of an advisory committee appointed by the common pleas court of the county, and notwithstanding said park and funds had up to the time of said accident always been so managed, controlled and supervised.

HAGAN, J.

The cause of action stated in the amended petition in this case is for the alleged negligence on the part of the defendant, by its agents, on the 14th day of August, 1910, and prior thereto, in allowing a certain pair of steps at the end of Isabella street and within Snyder Park, all of which park is within the limits of the city of Springfield, to become out of repair, defective and dangerous to pedestrians, said walk being made of certain wooden steps with a dangerous hole therein, and that said plaintiff on said date, in the night season, without knowledge of the existence of said hole and without negligence on her part fell into same and sustained great bodily injuries, for which she asks judgment against the defendant in the sum of \$10,000.

For its third defense to the amended petition the defendant alleges, in substance, that it is the owner and trustee for park purposes of said Snyder Park and also owner and trustee of certain funds to be used in connection therewith for repairing and improving said park; that it became such owner and trustee by virtue of certain devises and bequests; that it is now managing and administering said Snyder Park and said funds to be used in such connection therewith in accordance with the provisions and conditions of said devises and bequests; that the said devises and bequests require certain investments and changes of investments to be made upon the approval of a certain advisory committee appointed by a court or judge; that said park is and at the time of the accident alleged in the amended petition was and ever since has been controlled and administered by a certain board of park trustees, consisting of four resident electors of the city of Springfield, aforesaid, appointed by the trustees of the sinking fund of said city; that said board of park trustees entirely and exclusively controls and manages said park and controls, manages and supervises exclusively the maintenance and repair of all portions of said park, as well as all improvements of every kind in the same, and the council of the defendant, the city of Springfield, does not in any respect care for, supervise or control any portion of said Snyder Park, or any walks, street or portion of ground within the limits of said park; that the walk mentioned in the amended petition is situated entirely within the limits of said park and is no part of any public street, alley or highway, nor any part of any public ground of the city of Springfield under the care, supervision or control of the council of said city; that whatever injuries were inflicted upon the plaintiff, as complained of in said amended petition, the same occurred while said city was engaged in maintaining said park for the purpose of pleasure, convenience and health of the inhabitants of said city, and that in performing said functions, above stated, the said city had no proprietary or ministerial interest in the maintainance of said park, but was then and there exercising its usual and ordinary function of government.

1915.]

Krause v. Springfield.

To this defense the plaintiff filed a general demurrer, on the ground that it does not state a good defense to the cause of action set forth in said amended petition and said demurrer has been submitted to the court upon the briefs of the respective counsel for the parties.

It is claimed by the plaintiff that the defendant, the city of Springfield, is liable in damages for the alleged negligence on two grounds, viz: first, by reason of Section 3714, General Code, which provides:

“The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts within the corporation, and shall cause them to be kept open, in repair and free from nuisance.”

It is contended by counsel for plaintiff that parks are public grounds within the meaning of this section.

Assuming for the sake of discussion that parks are public grounds, yet the third defense, set forth in the amended answer alleging, as it does, that the city of Springfield holds said park in trust for said city and in the same capacity holds the funds constituting an endowment to be used in connection therewith, such trusteeship arising under the provisions and conditions of certain devises and bequests requiring all investments and changes of investments to be made upon the approval of a certain advisory committee, appointed by a court or judge; that said park has ever been controlled and administered by the board of park trustees, appointed by the trustees of the sinking fund of the said city, which board of park trustees has the exclusive control and management of said park and the maintenance and repair thereof, as well as all improvements of every kind within the said park; that the council of the city of Springfield does not in any respect care for, supervise or control any portion of said Snyder Park, or any walk, street or portion of ground within its limits, the place of the alleged accident being entirely within the limits of the said park, the court on an examination of the statutes of Ohio, Sections 4066-4082, inclusive of both numbers, finds that said sections provide a scheme for the management and

supervision of a municipal park and of funds to be used in connection therewith, where the municipal corporation in which the park is situated is the owner or trustee of the property and said park and funds came to the corporation by deed of gift, devise or bequest; Section 4066 declaring that such property or funds shall be managed and administered in accordance with the provisions or conditions of such deed of gift, devise or bequest. It is further provided that when such deed of gift, devise or bequest requires an investment or change of investment of the principal of such property or funds, or any part thereof, to be made upon the approval of an advisory committee appointed by a court or judge, then such property or funds shall be managed, controlled and administered by a board of park trustees, composed of four resident electors of the municipal corporation and to be appointed by the trustees of the sinking fund.

It is provided by Section 4072, General Code, as follows:

“Such trustees shall have the entire management and control of such property or funds, all improvements of every nature within such park or parks, moneys derived from levies made for park purposes, moneys from the general fund appropriated by the council for such purposes, proceeds of bonds issued or sold for park purposes and of moneys for other property donated to any such municipality for park purposes, all of which money shall be placed in a special fund called a ‘park fund,’ which shall be disbursed by the treasurer of any such city or village only upon the warrant of the auditor or clerk drawn in accordance with the order of the board of park trustees.”

The allegations of the third defense of the amended answer, while not as explicit as they might perhaps have been made, are yet sufficient to bring said Snyder Park within the operation of the sections of the General Code just cited by the court.

It is thus apparent that in the case of Snyder Park, as in similar cases of parks in municipal corporations, the council of this corporation does not have the care, supervision and control of the grounds contained in said park, and not having such supervision and control it is certainly not by virtue of this statute required to keep such grounds in repair and free from nuisance. In other words, the responsibility of the council under Section 3714, Gen-

1915.]

Krause v. Springfield.

eral Code, is commensurate with the power bestowed upon it by said section, and the control, supervision and management of parks of the status of Snyder Park, already referred to, are plainly taken out from under the operation of the statutory rule prescribed by Section 3714, the failure to observe which is the basis upon which negligence is predicated against the city by one who sustained injury by reason thereof.

If the ground of liability of the city in this case must be found in the violation of Section 3714, the third defense of the amended answer would be demurrable.

Is the defendant, the city of Springfield, liable at common law upon the cause of action already alleged in the petition?

If such liability exists, then the demurrer should be overruled.

It is agreed on all hands that a municipal corporation is not liable for damages for the misfeasance or non-feasance of its agents or employees in the exercise of its governmental functions.

It seems also to be well settled at common law that a municipal corporation must respond in damages to one injured by reason of the negligence of its agents or employees in relation to its proprietary interest.

The Supreme Court of Ohio has repeatedly decided that it is quite difficult sometimes to classify any particular case so as to satisfactorily place it in one class or the other; that is to determine whether it belongs to the governmental class or to the proprietary class.

It is well settled law in Ohio by the decisions of the Supreme Court, that where a municipality is acting virtually as a branch of the state government, as, for instance, in protecting persons and property through its police and fire departments, the municipal corporation is not liable for the negligent acts of its agents and employees in carrying on such departments, as it is discharging but one of the prime functions of the state, which is the protection of human life and property.

If the state had undertaken directly to discharge such functions it would be immune from damages for misfeasance or non-feasance and when it transfers such function to a municipal corporation the immunity of the state goes with such transfer to

such municipality as the agent, but as said by Judge Ranney in *Dayton v. Pease*, 4 Ohio State, page 80.

"But when a municipal corporation undertakes to execute those prescribed regulations by constructing improvements for the especial interest or advantage of its own inhabitants, the authorities are all agreed that it is to be treated merely as a legal individual and as such owing all the duties to private persons and subject to all the liabilities that pertain to private corporations or individual citizens. To this class most clearly belongs the construction and repair and maintenance of its streets."

The case of *Dayton v. Pease* was that of negligence of employees of the city in constructing a bridge.

The maintenance of the public health may also be regarded as a function of the state, and where it makes a municipal corporation its agent in the exercise of such function, damages can not be recovered for the negligence of a board of health or the health officers undertaking the discharge of such function. *Turner v. Toledo*, 15 C. C., 627.

In the case of *Bell v. Cincinnati*, 80 O. S., 1, the Supreme Court held that where a municipal corporation is authorized to establish, maintain and regulate a workhouse therein the directors of public service are invested with the management and control of said workhouse in behalf of the corporation and in so managing and controlling same the municipal corporation acts in a governmental capacity, not in a proprietary one. The court holds that the establishment and conduct of the workhouse is merely incidental to the proper exercise of the functions of the police department and for that reason is governmental.

An analogous case is where a public function is by the terms of the statute made mandatory upon a public agency, as, for instance, a board of education. It was held in the case of *Finch v. Board of Education of the City of Toledo*, 30 O. S., 37:

"A board of education is not liable in its corporate capacity for damages for an injury resulting to a pupil while attending a common school from its negligence in the discharge of its official duty in the erection and maintenance of a common school building under its charge, in the absence of a statute creating liability."

1915.]

Krause v. Springfield.

The court said on page 46:

“That the school district or the road district is invested with a corporate character the better to perform its special function. It is but an instrumentality of the state.”

And on page 48:

“The defendant here is but a *quasi* corporation of inferior grade, acting for the public as one of the state’s ministerial educational agents, with power to levy taxes for school and school building purposes and no other.”

In other words, in this case the court held that the work of education carried on by the board of education of Toledo was purely governmental in its character and therefore no liability attached for the alleged negligence. On the other hand, it will be noted that in *Dayton v. Pease*, as already said, the improvements of streets and highways do not constitute a government function in the sense in which we are now trying to define the same and this decision was rendered before Section 3714 or its original or anything of that nature was enacted by the Legislature of Ohio, so that the principle thus announced in *Dayton v. Pease* is an enunciation of the common law doctrine.

The case of *Cincinnati v. Cameron*, 33 O. S., 336, is an instructive one in this connection. This was a case where suit was brought to recover on account of work done for a municipal corporation in the construction of a hospital, where, because the fund provided for the payment of the obligation of the city was exhausted, it was claimed that no liability arose for the deficit, because the act of the city in constructing the hospital was governmental. The Supreme Court said:

“There is a distinction between those powers of a municipal corporation which are governmental and political in their nature and those which are to be exercised for the management and improvement of the property. As to the first the municipality represents the state and its responsibility is governed by the same rules which apply to like delegation of power. As to the second, the rules which govern the responsibility of individuals are applicable.”

At page 366 the court cites with approval *Dayton v. Pease* and also *Detrick v. Cory*, 9 Mich., 165, which last case gives an illustration as follows:

“The power given a city to construct sewers is not a power for governmental purposes, nor is it a public municipal duty imposed upon the city, like that of keeping streets in repair, but it is a special legislative grant by the state for private purposes. The sewers in the city, like its works for supplying the city with water, are the private property of the city, the corporation and its corporators; that is, its citizens are alone interested in it; the outside public as to the people of the state at large, have no interest in them.”

It cites the cases of *College v. Cleveland*, 12 O. S., 375, which held that municipal corporations are not liable for the action of a mob within its limits, and *Wheeler v. Cincinnati*, 19 O. S., 19, where it was held that the city was not liable for the failure to provide proper fire apparatus and to keep in repair public cisterns.

These cases are cited as illustrating the governmental functions of municipal corporations.

The court said, in the case of *Cincinnati v. Cameron*, at pages 368-9, when this hospital was built or contracted for, the city was exercising no governmental function. It was not appearing in its political character or manifesting any of the attributes of sovereignty. It was the owner of land upon which it was desirous of building a house. It was managing its own property.

Toledo v. Cone, 41 O. S., 149, is an instructive case in this connection. It was one brought to recover for the alleged negligence of an employee of the city in the construction of a vault in a cemetery owned by the city, whereby the plaintiff was injured. In this case the city had full control over the cemetery and governed it by means of a board of trustees chosen by the electors of the corporation. The court said in the syllabus that the city was not liable for the injuries resulting to the employee. The court clearly recognizes in this case that the Legislature, under the Constitution, may provide for the organization of cities, making them depositaries of certain limited governmental powers, to be exercised on behalf of the state for the public wel-

1915.]

Krause v. Springfield.

fare and that they are agencies or instrumentalities to which the state delegates a portion of its governmental power. For instance, the court said an obligation rested upon the state to aid, by proper legislation, in the protection of the property of its citizens. This function, delegated to a municipal corporation, is governmental. At page 161, the court said:

“Municipal corporations, however, are to be regarded in another and very different aspect. While they act in a public character or capacity and exercise public powers they may and do act also in a private capacity, like private corporations, and as such are held to a like responsibility. Thus, if a municipal corporation acquires real or personal property, and in the discharge of what may be deemed ministerial duties in respect to the same an individual receiving an injury through the negligence of its officers or servants, it should be held responsible to that individual though not liable for a defect in judgment or discretion while acting as a state instrumentality in the exercise of legislative functions, yet having like a private corporation, or natural person, become the owner or obtained the control of the property, it should not be relieved from the operation of the general maxim, that one should so use his own as not to injure that which belongs to another. Thus, if a city neglects its ministerial duty to cause sewers to be kept free from obstructions, to the injury of a person who has an interest in the performance of that duty, it is liable to an action for damages thereby occasioned.”

In the case at bar the court is unable to see that the city of Springfield was acting as an agent of the state and exercising governmental functions in the acquisition and management of Snyder Park up to the time that the alleged accident occurred. It was not mandatory on the city to accept the said park. It voluntarily acquired it and has maintained it as territory of which the city has the title as trustee and of which the public generally are beneficiaries. This is a proprietary interest and the functions it thus discharges in reference to the park are wholly different from those which it discharges with reference to its fire or police departments.

There are no decisions of the Supreme Court in Ohio on the question of liability of municipal corporations for the negligence of employees in the management and care of its public parks.

There are two cases, tried in common pleas courts, however, in which the subject is discussed and decisions rendered, holding the city liable for negligence on common law grounds. The first is that of *Bloom v. Newark*, decided by Judge Seward in 1905, and reported in 3 N.P.(N.S.), page 480, the syllabus of which is as follows:

“A municipality is liable in damages for an assault committed by the custodian or caretaker of a public park, where the assault is committed by such employee while acting in the line of duty.”

Judge Seward makes a clear distinction between governmental functions of a corporation and those which are exercised for the improvement of the territory within its corporate limits, holding in the latter case the same measure of responsibility as in the case of private individuals or corporations.

The second case referred to is that of *Harff v. Cincinnati*, decided by Judge Gorman, and reported in 11 N.P.(N.S.), 41. In this case Judge Gorman held the city liable either on its statutory liability for the care of public parks or upon its common law liability; in fact, holding it liable on each ground. The park in question, however, in that case was the property in fee of the city of Cincinnati and not held by it as a trustee and was under the direct control of its municipal authorities, under the general provisions of the park laws of Ohio, other than the sections relating to parks and park property, held on devises and bequests, already referred to. Therefore Judge Gorman, concluding that parks should be considered public grounds, held that the city was liable under Section 3714. He did not content himself, however, with this proposition, but said in the second proposition of the syllabus:

“A municipality in acquiring and maintaining public parks acts in a private rather than a governmental capacity and is liable for negligence in keeping pathways in such condition that injury results to one rightfully in the park and exercising due care.”

This case is directly in point, as the action was to recover damages for personal injuries suffered by the plaintiff from falling

1915.]

Krause v. Springfield.

into a large hole in or along a footpath in Eden Park, one of the public parks in the city of Cincinnati.

It is fair to say that outside of the state of Ohio there is some conflict of opinion as to the liability at common law of municipal corporations in case of the negligence of its employees in the management of parks. It is said, however, in 28 Cyc. at page 1311:

“Although there are some cases to the contrary, the management and care of public squares, parks and commons is ordinarily not a corporate duty and therefore the city is liable for injuries resulting from its negligence in caring for them.” Citing: *Jones v. New Haven*, 34 Conn., 1; *Carey v. Kansas City*, 187 Mo., 715; *Bartholdt v. Philadelphia*, 154 Pa. St., 109; *Lowe v. Salt Lake City*, 13 Utah, 91; *Ewen v. Philadelphia*, 194 Pa. St., 548, and other authorities, but citing to the contrary some authorities, particularly those in Massachusetts and *Blair v. Granger*, 24 R. I., 117.

The courts in Ohio may eventually classify the functions of government of a municipal corporation in reference to parks as governmental and not proprietary, but the court is unable to see, by the authorities in Ohio, how such a conclusion is to be reached.

The court therefore holds that the demurrer is well made and sustains the same.

**SUFFICIENCY OF SIGNATURES TO A REFERENDUM
PETITION.**

Common Pleas Court of Cuyahoga County.

IN RE SUFFICIENCY OF SIGNATURES UPON REFERENDUM PETITION
AMENDED SENATE BILL NO. 307, KNOWN AS THE McDER-
MOTT LAW, PASSED BY THE LEGISLATURE OF THE STATE
OF OHIO ON MAY 27, 1915.

Decided, September 14, 1915.

*Elections—Referendum Petitions Signed with an Indelible Pencil are
Valid—Name of Signer Must be Written by Himself—Definiteness
as to Residence of Signers.*

1. The constitutional provision that the names of all signers of referendum petitions shall be written in ink, is substantially complied with by the use of an indelible pencil, and an objection to the sufficiency of such signatures on the ground that they are written with an indelible pencil does not lie.
2. The requirement that the name of a signer of a referendum petition be written by himself is absolute; the date of signing and the residence of the signer are material, but may be filled in by another.
3. If the date of signing and residence of the person purporting to sign a petition do not appear on the petition, or if the residence can not be definitely ascertained from the petition, objection lies thereto.

*Cyrus Locher and Fred. W. Green, for petitioners.
Joseph McGhee and James T. Boulger, contra.*

ESTEP, J.

This petition is filed by the board of deputy state supervisors and inspectors of elections for Cuyahoga county, Ohio, under the provisions of Section 5175-29i of the code as amended on May 5, 1915.

The parts of the petition under consideration are numbered from "1" to "138" inclusive, being parts of a petition circulated for referendum on Amended Senate Bill No. 307, as passed by the Legislature of the state of Ohio, on May 27, 1915.

1915.]

In re Referendum Petition.

The board, after scrutinizing the parts of said petition referred to, by resolution passed on September 10, 1915, enumerated certain defects in the parts of said petition, and the court is now asked to declare the signatures to which objections have been made to be insufficient in law.

The following defects are set up in said resolution, which is attached to and made a part of the petition:

1. Signatures attached to the petition in indelible pencil, contrary to the provisions of the Constitution.
2. Dates of signing and places of residence appear on the petition in handwriting other than that of signers, contrary to the provisions of the Constitution.
3. Names appear upon said petition not in the handwriting of those whose names purport to be on the petition, which signatures are illegal and contrary to the provisions of the Constitution.
4. That in some instances the complete residences, as provided by the Constitution, are not given.
5. Names appear on the petition that are not on the registration books.

The case was submitted to the court upon the following stipulation entered into between counsel representing the board and counsel representing those interested in the petition:

"It is hereby agreed to by and between counsel herein that the total number of signatures contained upon parts of referendum petition upon Amended Senate Bill No. 307, passed by the Legislature upon May 27th, 1915, commonly known as the McDermott act, is 4878; that 4658 of said signatures are placed upon said parts of said petition with indelible pencil; that in case of 3961 of said signatures the county, city, and the said village and township do not appear upon said parts of said petition in the same handwriting as the signature. That in case of 569 of said signatures the complete residence of the person purporting to sign said parts of said petition do not appear upon said parts of said petition. That of said 4658 and 3961 signatures hereinbefore referred to, 175 are insufficient for other reasons.

"The parts of said petition referred to are parts numbered from one to one hundred and thirty-eight, both inclusive."

The answer to the objections or defects complained of call for a consideration of Section 1g of Article II of the Constitution, which relates to initiative, supplementary or referendum petitions, their requirements, etc.

The first objection relates to the signing of 4658 signatures made with an indelible pencil. This objection is not very seriously urged by the board.

The Constitution requires, in the provision above referred to, that the names of all signers to such petition shall be written in ink, each signer for himself.

The purpose of this provision has for its object the preservation of the signatures, and to prevent them from being erased from the petition. It is practically conceded that an indelible pencil contains ink solidified, and that the purpose and intent of preserving signatures is fully complied with in the use of the indelible pencil. It has been the almost universal practice in this state, in the signing of petitions of the character of the one in question, to use the indelible pencil, and, so far as I am advised, no one has ever questioned its use up to this time. I think that the provision of the Constitution has been substantially complied with in this respect, and this objection is overruled.

The second objection in the stipulation refers to 3961 of said signatures in which the county and state, and the village and township following the signer's name do not appear in the same handwriting as that of the signature.

Section 1g, Article II of the Constitution makes it mandatory that the signing of the petition should be by the signer himself. This act can not be delegated to another. This clearly appears upon a careful reading of this section of the Constitution. The name of the signer must be signed by himself, and shall be written in ink. The circulator of the parts of the petition must make oath that each of the signatures was made in his presence; that the signature was genuine; that he believes that the person who signed said petition had knowledge of its contents, and that he signed the same on the date set opposite his name. It is also a necessary requirement of the Constitution that the date of signing and the place of residence of the signer shall appear opposite his name on said petition. The Constitution provides that the

1915.]

In re Referendum Petition.

signer shall place on such petition, after his signature, the date of signing and his place of residence. A resident of a municipality shall state, in addition to the name of such municipality, the street number, if any, of his residence, and the ward and precinct in which the same is located. If he resides outside of a municipality, he shall state the township and county in which he resides. Nowhere in this provision of the Constitution do we find the express requirement that the signer of the petition shall write this data. If it might be said from any language in this section of the Constitution, that the signer should write in this data, in my opinion it is not a mandatory duty, but directory only. I am of the opinion that the signer can give this information to the circulator of the petition, and that it can be written in by another person. This data in relation to place of residence of the signer and date of signing must be given, and must be placed upon the petition opposite the signer's name. If it does not so appear upon the petition in the proper place, the name should not be counted; otherwise the board would have no means of determining whether or not the signer is an elector, whether the signature is genuine, nor would the board have any means of detecting fraud and perjury in the procurement of signatures to these petitions.

In a consideration of Section 1g, Article II of the Constitution, I feel satisfied that, while the name of the signer to a referendum petition should be written by himself, and that it is an absolute requirement that the date of signature and place of residence shall appear on said petition opposite the name of the signer, yet I am of the opinion that this information, given by the signer as to his place of residence and date of signing, may be placed upon the petition by another, and in a different handwriting than that of the signature. Holding this view, I overrule this objection.

The third objection contained in the stipulation relates to 569 signatures where the complete residence of the person purporting to sign said parts in said petition do not appear on said parts of said petition.

I have already held that the requirement that the residence of the signer and the date of signing, as required by the Constitu-

tion, is a material requirement, and that the same, as required by the Constitution, should appear in the petition in connection with the name of the signer. If the residence of the person purporting to sign said petition, and the date of the signing, do not appear upon the parts of said petition filed, and is not complete in the sense that his residence as set out in the petition can not be definitely ascertained, then I am of the opinion that this objection should be sustained, and that the 569 names should be taken from the parts of the petition upon which they appear. I am inclined to think, however, that if the residence is not set out in complete detail, yet if from the information set out opposite the signature the residence of the signer can be reasonably gathered and ascertained, the objection would not be well taken. Not being advised as to the extent of the completeness or incompleteness of the data as to the residences of those 569 signers, I am unable to say whether or not all of these signatures should be taken off. This could only be ascertained from an inspection of the petition.

It is stipulated by counsel that, of the said 4658 and 3961 signatures hereinbefore referred to, 173 are insufficient for other reasons, and the court therefore, by consent of counsel, takes from the parts of said petition the 173 names referred to.

1915.]

Tiernan v. Cincinnati.

ILLEGAL APPOINTMENTS UNDER THE CIVIL SERVICE LAW.

Superior Court of Cincinnati.

PHILIP TIERNAN, A TAX-PAYER, v. THE CITY OF CINCINNATI ET AL.

Decided, March 22, 1915.

Civil Service—Vacancies Created by Abolishing Positions—Rights of Incumbents of the Offices Abolished—Names Once Placed on the Eligible List Can Not be Removed—Council Can Not Fix Qualifications of Applicants by Ordinance—Necessary Parties to a Determination as to Whether Appointments Have Been Illegally Made.

1. A vacancy can not be created in a position in the municipal service by an ordinance which abolishes the position and then re-establishes exactly the same position under a different name.
2. The sole purpose of the rule and the statute requiring the head of a department to notify the commission when any position is abolished and to furnish the names of incumbents thus losing their places, is to compel the commission to put back on the eligible list the names of such incumbents.
3. The civil service commission may refuse to admit to examination an applicant who lacks the established requirements, and after examination may refuse to certify one who has passed the examination but has thereafter been found lacking; but the commission has no authority to remove from the eligible list names which have been certified for appointment in answer to the requisition of an appointing officer.
4. For an appointing officer to refuse to appoint persons who have been certified to him as eligible and to have such names removed from the list is in violation of law, even though he believes such persons are incompetent or inefficient or even immoral or vicious.
5. A municipal council has no authority to fix by ordinance the qualifications which shall be required of applicants for any office or position in the competitive service in the respect specified by the statute, and determination of the amount of experience which shall be required of such applicants is specifically conferred on the civil service commission.

Moulinier, Bettman & Hunt, for plaintiff.

Walter M. Schoenle and Chas. A. Groom, City Solicitors, contra.

PUGH, J.

This is an action brought by Philip Tiernan, a tax-payer, against the city of Cincinnati, Edward S. Keefer, John J. Weitzel and Andrew H. Poppe, composing the civil service commission of said city, and William Leiman, the city auditor, and Richard B. Witt, the city treasurer, to restrain the misapplication of the city's money.

The city solicitor was requested to bring this action and, upon his refusal, the present tax-payer's suit was begun. As will hereafter appear, the plaintiff, Philip Tiernan, was personally interested in the transactions out of which this litigation arose, but has no present interest in the controversy other than that he is fully authorized by Sections 4311 and 4314, General Code, to maintain the suit.

On January 7th, 1913, Philip Tiernan and Reuben J. White were duly appointed to the positions of "tenement house inspectors" at a salary of \$1,400 per annum, and Lewis S. Arnold was appointed to a like position at the same salary on March 3d, 1913.

These positions were created by an existing ordinance of the city of Cincinnati (Ordinance Code, Section 333-10, p. 121), and were all in the sub-department of buildings of the department of public safety. They were in the competitive classified service as defined by the civil service law of this state and the appointments were duly made from a competitive eligible list furnished by the civil service commission of the city of Cincinnati.

On February 11th, 1913, the council of the city of Cincinnati passed another ordinance whereby *inter alia*, Section 333-10 aforesaid was repealed and the "sub-department of housing inspection of the department of public safety" was created, and the appointment of "housing inspectors," at a salary of \$1,400 per annum was authorized (Ordinance No. 100, February 11, 1913, Ordinance Code, Sections 226 and 339-3). This ordinance took effect sixty days after its passage and at a time when Tiernan, White and Arnold were serving as "tenement house inspectors" under the former ordinance. All concerned, obviously regarded the "housing inspectors" created by Ordinance

1915.]

Tiernan v. Cincinnati.

No. 100 as nothing more or less than the "tenement house inspectors" of the older ordinance under a new name, and, indeed, the distinction is without difference. White and Arnold were permitted to perform the duties of "housing inspectors" and continued to do so for some sixteen months after Ordinance No. 100 went into force without any formal re-appointment and, apparently, without any suggestion from any one that any real change had taken place.

On July 15th, 1914, the council of the city of Cincinnati passed a third ordinance whereby the sub-department of "housing inspection" was changed to the sub-department of "buildings" and the positions of "housing inspectors" were abolished and the appointment of three "deputy inspectors of buildings" provided for instead (Ordinance No. 410, 1914, Sections 226 and 333-8a).

The difference between the positions of "tenement house inspector," "housing inspectors" and "deputy inspectors of buildings" provided for by these three ordinances is merely nominal. The qualifications required by the ordinances for appointment are identical. The qualifications of applicants for any one of these positions, as determined by the civil service examinations, are the same as those required for any of the two others. Any person on the eligible list for any one of these places was eligible for the others. So far as the legislation contained in these ordinances is concerned, there has been no real change in the position of "tenement house inspectors" since the original appointment of Tiernan, White and Arnold—except in name.

The court believes that a vacancy can not be created in a position in the competitive classified municipal civil service by an ordinance which abolishes the position and then re-establishes exactly the same position with merely a change of name. It would certainly be contrary to the intendments of the civil service act that an incumbent in the classified service, duly qualified in competitive examination, placed upon the eligible list by the civil service commission and legally appointed therefrom, could be removed by an ordinance of the municipal council which purports to abolish the position but in reality continues it in existence under another designation. It is unnecessary, however, in

the determination of the present controversy to pass upon this issue.

The ordinance of July 15th went into effect August 17th, 1914. Tiernan, White and Arnold, who were described as "tenement house inspectors" by the terms of the ordinance under which they were appointed and as "housing inspectors" by the ordinance of February 11th, 1913, under which they were permitted to continue their incumbency without re-appointment, evidently believed that their incumbency had been terminated and at once applied to the municipal civil service commission to have their names placed upon an eligible list for positions requiring similar qualifications and calling for similar duties to those from which they believed they had been removed by the ordinance in question.

Section 107 of the "Rules and Regulations of the Civil Service Commission of Cincinnati" provides as follows:

"When any office or position in the classified service is abolished it shall be the duty of the head of the department to notify the commission in writing forthwith, and the name or names of the incumbents shall be placed in the order of the notice to the commission at the head of an eligible list for positions requiring similar qualifications and calling for similar duties, to be certified therefrom according to law."

The civil service law of this state (Section 486-16, General Code) also provides:

"Whenever any permanent office or position in the classified service is abolished or made unnecessary, the person holding such office or position shall be placed by the commission at the head of an appropriate eligible list, and for a period of not to exceed one year shall be certified to an appointing officer as in the case of original appointments."

In pursuance of the statute and the rule quoted, the civil service commission placed the names of Tiernan, White and Arnold on the eligible list for any positions in the sub-department of "buildings" requiring similar qualifications and calling for the performance of duties similar to those of the positions which were thought to have been abolished by the ordinance of July

1915.]

Tiernan v. Cincinnati.

15th, 1913. On August 17th, 1914, the director of public safety notified the civil service commission in writing that the ordinance of July 15th, 1914, had become effective and that, *inter alia*, it abolished the positions of "housing inspectors" of which Philip Tiernan, R. J. White and Louis S. Aruold were "incumbents." The communication begins thus:

"HON. CIVIL SERVICE COMMISSION. Gentlemen:

"Pursuant to the requirements of rule No. 107 of your commission, we hereby notify you that Ordinance No. 410, 1914, passed July 15, 1914, is effective this date, having been filed with the mayor on the 17th July."

The Rule No. 107 referred to is the one above quoted, which requires the "head of the department" to notify the commission when any position is abolished and to give "the name or names of the incumbents," so that they may be placed at the "head of an eligible list" for positions requiring like qualifications and calling for similar duties. The sole object of this rule (and the statute to the same effect, Section 486-16, General Code, above quoted) is to compel the civil service commission to put back on the eligible list the names of incumbents who had been appointed after competitive examination and where offices or positions for any reason had been abolished. In sending this communication, the director of public safety, as head of his department, complied with the letter of both the rule and the statute, and the commission did likewise in placing the names of Tiernan, White and Arnold again on the eligible list.

On September 28th, 1914, the director of public safety sent a requisition to the civil service commission for an eligible list from which "to fill the position of deputy housing inspector," and, in reply, the commission certified to him the names of Philip Tiernan, R. J. White and Louis S. Arnold. There were no other names eligible for these positions at this time.

• Assuming that there was a position in the classified service to be filled, everything required by law had been done when the civil service commission, in answer to the requisition of the director of public safety, sent the latter an eligible list containing the names of Tiernan, White and Arnold, and it remained only

for the director to make the appointment from the names thus certified. The civil service act (Section 486-13, General Code) provides:

“The appointing officer shall notify said commission of each position to be filled separately, and shall fill such position by appointment of one of three persons certified to him by the commission therefor.”

This statute is mandatory. No discretion is left the appointing officer and no reason or excuse for non-compliance with this law can legally exist. No appointment can legally be made except from the list thus certified. One main object of the civil service act is to compel appointing officers to select and appoint to places of public employment such persons, and such persons only, as have succeeded in getting upon the eligible list by competitive examination, and to take away from such appointing officers, save in a few carefully excepted instances, all discretion and authority to make appointments in any other way. The fact, if such it be, that the persons whose names are certified by the commission are objectionable to the appointing officer on political, religious or personal grounds, does not relieve him from the necessity of making the appointment from the list. The belief of the appointing officer that all of the persons whose names are on the eligible list are incompetent or inefficient, or even immoral or vicious will not justify him in refusing to make the appointment.

It is for the civil service commission and not for the appointing officer to determine whether or not applicants for public employment are competent, efficient and of good character, and the civil service act not only provides a method for determining such competency and efficiency but, in addition, bestows ample power upon the commission to prevent by competitive examinations unfit or inefficient persons being certified for public employment. The language of the civil service act (Section 486-10, General Code) leaves us in no uncertainty on this point when it provides, in reference to the examinations to be held by the civil service commission, as follows:

“All applicants for positions and places in the competitive classified service shall be subject to examinations which shall be

1915.]

Tiernan v. Cincinnati.

public, competitive and free for all, with specified limitations, *determined by the commission, as to citizenship, residence, age, sex, experience, health, habits and moral character.*”

Furthermore, when an application is made for examination, it is provided by Section 486-11, General Code, that:

“The commission may require in connection with such application such certificate of citizens, physicians or others having knowledge of the applicant as the good of the service may demand. The commission may refuse to examine an applicant, or after examination to certify an eligible, who is found to lack any of the established preliminary requirements for the examination or who is physically so disabled as to be rendered unfit for the performance of the duties of the position which he seeks or who is addicted to the habitual use of intoxicating liquor or drugs to excess, or who has been guilty of any crime or of infamous or notoriously disgraceful conduct, or who has been dismissed from the public service for delinquency or misconduct, or who has made false statements of any material fact, or practiced or attempted to practice any deception or fraud in his application, in his examination, or in establishing his eligibility or securing his appointment.”

The intent of this statute is obvious. The civil service commission may refuse to admit to examination any applicant who lacks the established requirements; *even after examination* it may refuse to certify a person who has passed the examination but has thereafter been found lacking, but, once placed upon the eligible list and certified for appointment in answer to a requisition of an appointing officer, even the civil service commission can not remove such person's name from the list. It was never intended to bestow upon the commission an absolute power of determining who should or should not be appointed to public service. The authority given is ample but is restricted within carefully defined limits. The appointing officer, however, is given no discretion whatever other than that of deciding which of the persons named in the certified list he will select.

When the eligible list, containing the names of Tiernan, White and Arnold, was certified, as above related, the director of public safety refused to make the appointment. He objected to the names certified to him and at once took steps to have them re-

moved from the list. In view of the precise and mandatory provisions of the civil service act, what he did, in this regard, was in violation of that law.

September 30th, 1914, on receipt of the certified eligible list, the director of public safety sent a communication to the civil service commission in which he said, *first*, that the persons whose names the commission had certified to him were not efficient; *second*, they had not had the experience required for such positions; *third*, the civil service commission is desired to establish an "efficiency rating for submission to this department," and to this end, the commission will be furnished with efficiency records of the persons whose names it has already certified, which records will be made up for that purpose; and *fourth*, that Rule 135 of the civil service commission, relating to efficiency records is "at variance" with the statute of the state as embodied in the civil service act, Section 486-18, General Code.

From what has already been said, it is apparent that as matter of law the director was not authorized to object to the persons whose names were certified by the commission, and as matter of fact, the efficiency of those persons had already been established by the only method authorized by law, viz., competitive examination, and they had accordingly been certified as efficient by two successive civil service commissions.

The city ordinance purporting to create the positions of "deputy inspectors of buildings" prescribed that appointees should have five years' "experience" in the building trade, and it is to an alleged lack of "experience" in this respect that reference is made in the communication above quoted.

The civil service statute above quoted (Section 486-10, General Code), having declared these examinations are to be "free for all," except as to such limitations in certain respects as shall be determined by the commission," it would seem that the municipal council had no power to change or amend this act of the Legislature by assuming to itself the right to fix by ordinance what should be required of an applicant for any office or position in the competitive classified service in the respects specified in such statute. The authority to determine what "experience" shall be required of applicants for positions in the competitive

1915.]

Tiernan v. Cincinnati.

classified service is specially conferred on the civil service commission by this law and any exercise of such authority by any other board, council, or officer would thereby be denied. In any event, the appointing officer had no authority in the matter.

The director acted under an erroneous view of the law when he stated that Rule 135 of the civil service commission was at variance with the civil service act (Section 486-18, General Code) and this mistake probably led to his subsequent interference with the commission in the performance of the duties imposed on it by law. The statute to which he refers directs the commission to make investigation and establish efficiency records of incumbents of public offices and positions and then provides:

“The commission shall report to the officer in charge of a department, board, commission or institution its findings and recommendations relative to increasing the efficiency therein and all cases of failure of officers or employees therein to maintain a satisfactory efficiency record, which failure shall be sufficient ground for the dismissal of any such officer or employee. Such reports shall be deemed public records.”

This section concerns only such officers and employees as are already in public service and has no relation to candidates whose names are on an eligible list and certified as such, but not yet appointed. It means what it says, *i. e.*, that on a report from the commission of the failure of an employee to maintain an established grade of efficiency, such employee may be discharged. But the discharge is to be made by the head of the department under Section 486-17, General Code; there is no authority of law for a discharge by the commission under any circumstances.

Rule 135, to which exception was taken by the director, *relates exclusively to promotions* of incumbents and is not in any respect at variance with the statute. Promotions are governed by Section 486-15, General Code, which provides expressly for “promotional examinations” and the use of efficiency records in connection therewith. The entire matter of certifying incumbents for promotion is exclusively within the control of the civil service commission; “discharges,” however, are to be made by the executive heads of departments.

On October 16th, 1914, the director sent a second communication to the civil service commission:

"HON. CIVIL SERVICE COMMISSION, Gentlemen:

"We have your communication of the 14th inst., with enclosure relative to the appointments from certifications made September 30th, covering appointments for the department of tenement house inspection. We call your attention to our communication to your commission of September 30th, with reference to the qualifications of the men who formerly held the positions of tenement house inspectors. For your further information, we submit the efficiency records of Messrs. Tiernan, White and Arnold as submitted by the building commissioner, Mr. Rendigs. Mr. Rendigs further states that these men have not had the required experience in the building trade and consequently would be ineligible for the positions in question. We would be pleased to take up this matter with your commission at any time in order to arrive at a proper understanding relative to the qualifications necessary for establishing an efficient tenement house department.

"Yours very truly,
"DEPARTMENT OF PUBLIC SAFETY,
"EDWARD P. DURR."

When reading this communication, it is enlightening to recall the fact that the qualifications of tenement house inspectors had been attempted to be fixed by the terms of the ordinance (Section 333-10) in force when Tiernan, White and Arnold were originally appointed in February and March, 1913, and that, after a competitive examination, the civil service commission certified that these men were qualified and fit persons to perform the duties of these positions, and that the qualifications prescribed by the last of the three ordinances on this subject (the one in force when the above communication was sent) are in nowise different from those prescribed by the first ordinance, and that the then existing civil service commission had itself certified that the persons in question were duly qualified under the last ordinance and were fit persons for appointment to the positions in question.

Subsequently, what were called "efficiency records" during the former term of service of Tiernan, White and Arnold as housing inspectors were made up under orders of the director by George

1915.]

Tiernan v. Cincinnati.

E. Rendigs, building inspector, and sent to the civil service commission, and from these and other information communicated by the director in person, the commission withdrew from the eligible list, already certified by it for appointment, the names of White and Arnold, and sent up a revised list containing the name of Tiernan only.

The statute above referred to (Section 486-18, General Code) requires the civil service commission itself to make investigation and establish its own efficiency lists. While this law contemplates that each department shall maintain records of efficiency of its employees and that they "shall be open at all times to inspection by the commission," it by no means intends that these shall constitute the efficiency records directed to be kept by the civil service commission itself. On the contrary, a clear distinction is made by the language used in this section whereby the former, the department records, are described as the "records, reports and marking of efficiency in each department, office and institution," and the latter, the only record on which the commission can legally act, is characterized as the "efficiency records of the commission," and is directed to be made up by the commission from its own "investigations." It is true that the department records may be taken into consideration in making such "investigations" but they are expressly made "subject to review and correction by the commission," and, in any event, could only become official after examination and adoption by the commission. It is plain that, in this instance, no efficiency records of any of these three men were kept or thought of until after the refusal of the director of public safety to appoint them from the eligible list certified to him by the commission on September 30th, 1914.

The "efficiency records of the commission," if any such existed, could have legally been employed by it either in connection with the making of promotions or in reporting to the head of a department the failure of an *incumbent* to maintain an established grade of efficiency. Such records, if any such there were, were not legally available for any other purpose, and certainly not for removing from an eligible list the names of persons whose efficiency had been established by competitive examination and which had actually been certified for appointment. Least

of all was it lawful in an instance where no grades or lists of efficiency had theretofore been established to make them up, *ex post facto*, and employ them for the purpose of removing from a certified list the names of persons whose eligibility had been established by the only method permitted by law.

It should be noted that the civil service act itself provides methods of getting rid of unfit or inefficient incumbents of public office or position. Section 486-13, General Code, prescribes that appointments shall be made for a "probationary period of not to exceed three months" and that if the appointee's "service is unsatisfactory" he may be removed at the end of such period "with the approval of the commission," and Section 486-17, General Code, authorizes the appointing officer, on compliance with a few simple requirements, to discharge "incumbents" for cause without trial, at any time. After an applicant for a position in the competitive classified service has had his qualifications and efficiency determined by competitive examination under Section 486-10, General Code, and such additional investigation and inquiry as the commission is authorized to make under the statute above quoted (Section 486-11, General Code) and has been certified by the commission to an appointing officer as eligible for the position to be filled, neither the appointing officer nor the commission itself has any authority to question or dispute such eligibility. Nothing remains other than to make the appointment and, if the appointee is inefficient, remove him at the end of the probationary period or discharge him at the first manifestation of such inefficiency.

Upon the withdrawal of the names of White and Arnold from the certified list, the director of public safety refused to appoint Tiernan, whose name alone remained, and appointed one James A. Gustin, who had not taken any civil service examination and, of course, was not on any eligible list. Later, Gustin submitted to a non-competitive examination and was appointed by the director as provisional "tenement house inspector." Two subsequent requisitions were made by the director for an eligible list for the two remaining positions and each time the single name of Tiernan was certified by the commission, resulting in the selection by the head of the department, first, of Charles A. Tooker and

1915.]

Tiernan v. Cincinnati.

then of Edward O'Connor, neither of whom had undergone any examination and whose names did not appear on any eligible list. Tooker and O'Connor later submitted to non-competitive examinations and were appointed. The net result of all this has been that three persons who had qualified as required by law, successfully passed competitive examination and, in answer to a requisition of the director of public safety, had been certified on an eligible list for appointment as tenement house inspectors, were all three set aside and three persons who were selected by the director himself, and who at the time had not submitted to any examination whatever, were appointed to these positions and later qualified by passing non-competitive examinations. This result has been brought about by more than one violation of the civil service law, and the appointments of James A. Gustin, Charles A. Tooker and Edward O'Connor were therefore illegal.

As stated, this is an action by a tax-payer to restrain the "mis-application of funds" of the city of Cincinnati and is authorized by the express statute law of this state, Sections 4311 and 4314, General Code. To pay public moneys by way of salary to persons illegally appointed to public office or employment would be a mis-application of such moneys and the tax-payer's application for an injunction to prevent it must be granted.

This case was tried, argued and submitted for decision, and, upon mature consideration, the court held that James A. Gustin, Charles Tooker and Edward O'Connor were so immediately interested in the litigation that they ought to be made parties to the case. Strictly speaking, the court is of opinion that the action could proceed to final decree without these new parties, but it was deemed only equitable to allow them their day in court.

An order was therefore made by the court, on its own motion, making Gustin, Tooker and O'Connor parties defendant in the case and summons was issued and served upon them as provided by law. No answers have been filed by any of these new parties and they are all some weeks in default.

The court is unable to perceive that there is anything to be said on behalf of these parties further than what has already been very fully and ably said by counsel at trial of this case. The questions involved are of a nature calling for immediate deter-

mination, and, as matter of fact, would have been already disposed of but for the necessity of waiting upon possible action by these defendants themselves. No reasons exist for any further delay, and the plaintiff's motion for judgment on the pleadings against these defendants will therefore be granted.

**LIABILITY FOR INJURIES AS BETWEEN GAS
COMPANY AND CITY.**

Common Pleas Court of Franklin County.

JOHN THORNTON V. COLUMBUS GAS & FUEL CO.

Decided, March 4, 1915.

*Negligence—Bar of a Previous Action—Effect of a Contract of Indemnity
—Tort Feasors Who are Not Joint—Pleading.*

An indemnity contract, executed by a gas company and saving the municipality from damages in certain cases, does not make a judgment in favor of the city in such a case a bar to a similar action against the gas company for the same injuries, particularly where the second action is based on independent negligence on the part of the gas company.

F. S. Monnett, for plaintiff.

Addison, Clark & Harvey, contra.

BIGGER, J.

Heard on motion to amended answer and amendment to motion.

I consider first the motion which is addressed to the second defense of the amended answer; and I prefer to consider the question as to whether or not anything amounting to a defense is stated in this so-called second defense, as a court should not concern itself or consume the time of the court and counsel in controversies as to the form of a plea which has no validity. In my opinion nothing which amounts to a defense is stated in this second part of the answer. The reference to Bates, page 2737, must be a mistake in reference; *Bell v. McColloch*, 31 Ohio St., 397, is not authority to support defendant's claim. In that

1915.]

Thornton v. Gas Co.

case where the parties to the former action were the same as that at bar, it was decided that the judgment in the former case was a bar in the latter because the same question between the same parties had been put in issue and decided in the former case. The real issue was as to the validity of a note and written contract, and it was decided that the party who resisted liability and sought to have the contracts canceled must set up all the defenses he had in the first suit and could not first plead fraud and, if he failed, set up a new ground in the second action where the issue was the same. That is all that case decides. *Boston v. Worthington*, 76 Mass. (10 Gray), 496; *Milford v. Halbrook*, 91 Mass. (9 Allen), 17; *Robbins v. Chicago*, 71 U. S. (4 Wall.), 657; *Littleton v. Richardson*, 34 N. H., 179, are not in point here. Those were actions in which the question was as to the effect of a judgment upon one who was liable over to another, judgment having been taken against him to whom he was liable over. If in this case judgment had gone against the city, then in an action by the city against the gas company on its indemnity contract the judgment against the city would have concluded it. And that on the principle that the gas company could have assumed or assisted in the defense because of its interest in the question at issue. But that is a different question from the one here involved. The question is not to be resolved, in my opinion, on the suggestion of plaintiff's counsel that the city and the gas company were joint tort feorsors, because they were not joint tort feorsors.

Now, I have no doubt that the judgment in the former action is a bar to any liability over of the gas company to the city whether that liability over be founded on an indemnity contract or on the principles of substantive law. But I am just as clearly of opinion that the judgment in the former case does not conclude the plaintiff in this action. The doctrine stated in the text in 23 Cyc., 1270, is, I think, too broadly stated and is not supported by the cases cited so broadly as it is stated.

In the case of *Hill v. Bain*, 15 R. I., 75, the decision was founded on the principle of estoppel, and I observe the editor in a foot-note criticises the decision saying that the mistake in applying the principle of estoppel in such a case must arise from confusion of thought.

But whether that case was rightly decided or not it is clearly distinguishable from this. In that case the first suit was against the indemnitor, and it was held that in the case at bar it was necessary to prove everything necessary to be proven in the first case and something more. This case is the reverse of that. In this case it would seem a recovery may be had on less proof than would be required against the city. It was the defendant which was directly responsible, if any one was responsible. In the case against the city it would be necessary to prove the city had knowledge of the existing danger, or in the exercise of ordinary care would have known it. That the gas company had knowledge of defects in construction or excessive pressure in the pipes might be established by much less proof and of a different kind from that necessary to charge the city. Again an important distinction between that case and this and an apparently controlling consideration in that case is this. The indemnitor in that case had already had judgment in his favor. The relation between the city and the indemnitor was such that if the city was held liable he could be compelled to reimburse the city for an injury which the plaintiff must prove was due to the negligence of the indemnitor, although the plaintiff on this very issue against the indemnitor had failed to prove it. And if the city should call on him to defend against the claim, as it could, the indemnitor would be compelled to defend a second time against the claim of plaintiff when he had once defended against the identical claim and had judgment in his favor.

But in this case the issue is not identical with that in the former case. The defendant was not a party in the first case and if it had been, in my opinion the former judgment would not be a bar, as its liability here is not predicated on the negligence of the city, but upon its own independent negligence.

If counsel for defendant wish to submit any further argument the court will receive it, as I am taking a view which may not have been anticipated although defendant's counsel has made an argument as upon demurrer touching the sufficiency of the defense. If it is not desired to further argue the question a demurrer may be filed and sustained.

1915.]

State v. Griffith.

**OBTAINING MONEY ON A CHECK THAT HAD BEEN
RAISED.**

Common Pleas Court of Hamilton County.

STATE OF OHIO V. JOHN C. GRIFFITH.*

Decided, September 29, 1914.

*Criminal Law—Forgery, Uttering Forged Check and Obtaining Money
by False Pretenses—Reopening of Case for Hearing of a Witness—
Verdict Not Inconsistent—Evidence of Impeaching Witness.*

1. It is not inconsistent for a jury to find a defendant not guilty of forgery or the uttering of a forged check, but guilty of false pretenses in obtaining money upon a check which had been raised.
2. It is within the discretion of the court to reopen a case for the purpose of calling a witness to testify as to a point involved in a special charge which has been asked.
3. A motion lies to strike out the answer of an impeaching witness, whose reply to a question as to whether the reputation of the person named was good or bad, was "Well, with me it has been bad."

Cogan, Williams & Ragland, for the motion.

Walter M. Locke, Assistant Prosecuting Attorney, contra.

MAY, J.

Opinion overruling motion for a new trial.

The defendant in this case was indicted on three counts.

The first count charged the defendant with forging a check drawn on the Second National Bank, to the order of cash, pay roll, signed by the Westlake Construction Company, *per* George Sexton, General Superintendent. The contention was that the check was originally made out for \$1,597.30, and that the defendant altered it so that it read for \$3,597.30.

The second count charged the defendant with uttering and publishing as true and genuine the check set out in the first count of the indictment, knowing the same to be false, forged and counterfeited at the time it was uttered.

*Affirmed by the Court of Appeals, *Griffith v. State*, 24 C.C.(N.S.),—.

The third count alleged that the Westlake Construction Company was a depositor of the Second National Bank and had on deposit, subject to withdrawal, \$3,600, and that the defendant presented the check set out in the first count of the indictment, payable to cash, pay roll, in the sum of \$3,597.30, representing it to be a good and valid check of the Westlake Construction Company to the amount of \$3,597.30, well knowing in truth and in fact that the check so presented was originally made out in the sum of \$1,597.30 and had been altered and changed by him from \$1,597.30 to \$3,597.30 without the knowledge or consent of the Westlake Construction Company or George Sexton, with the intent to cheat and defraud the Second National Bank out of the same, and that at the time he so falsely pretended as aforesaid he well knew the said pretenses and all of them then and there to be false. In short, the third count was for obtaining money from the Second National Bank by false pretenses.

From the record of the case it appears that at the October term, 1913, the defendant had been indicted for embezzling from the Westlake Construction Company a sum of money amounting to \$5,434.06, and at the January term of the court of common pleas he was arraigned on said indictment for embezzlement and pleaded guilty and was given a suspended sentence.

After the indictment in the present case was returned a plea in bar was filed to the third count of the indictment on the ground that the money obtained by false pretenses from the Second National Bank was included within the amount charged as having been embezzled by the defendant. Judge Gorman, then sitting in the criminal room, sustained a demurrer of the state to this plea in bar, and this ruling was followed by the trial judge.

At the trial there was a conflict of evidence as to whether or not the check was altered after it was signed by the superintendent, Sexton. Sexton testified that when he signed the check the amount was \$1,597.30. The receiving teller of the Second National Bank, who was acting as paying teller in the absence of the regular paying teller, testified that the check was not altered. The evidence also showed that the defendant, Griffith,

1915.]

State v. Griffith.

cashied a check, receiving \$3,597.30 from the bank, and left his bank book for balance, he having charge of all the banking business of the Westlake Construction Company, and that immediately after receiving canceled check he left the city and that the canceled check was never returned to the company.

The jury returned a verdict of guilty on the third count of the indictment, that is, finding the defendant guilty of obtaining \$2,000 from the Second National Bank by false pretenses.

The defendant has filed a voluminous motion for a new trial, setting out twenty grounds. Upon the argument of this motion all the grounds were not pressed.

There are three grounds which are especially pressed by counsel for the defendant.

The first is that the verdict of the jury is inconsistent in that it found the defendant not guilty on the first and second counts of the indictment, that is, not guilty of forgery and uttering a forged check, but guilty of obtaining money from the bank by false pretenses on a forged check.

From the evidence I can not say that this verdict is inconsistent. The jury were instructed that they could not find the defendant guilty on the third count of the indictment unless they found that the check was forged or altered at the time that it was presented by the defendant to the bank and the defendant knew at the time that he presented the check that it was forged or altered in the amount and that he presented it with the intent to receive the larger amount on the check and that the bank acted upon his representations to its detriment.

The court said in its charge:

“If this check was signed by Sexton and at the time it was signed by Sexton was made out to the amount of \$3,597.30, and Sexton made out the check for that amount or signed it with that amount in it at the time that he signed it, the defendant can not be guilty of obtaining money on false pretenses under the third count of the indictment, for the reason that the bank would not have been defrauded of any money. The bank would have honored a check drawn by a depositor under a proper signature and between the bank and the depositor the bank could not be liable and therefore could not have been defrauded of its money.

But if the check was a forged check at the time it was presented for payment at the bank and Griffith in presenting a forged check to the bank knew it was forged and fraudulent and represented to the bank in the presenting of it that it was a good check and had been drawn for the full amount, and the bank had paid the check, then the bank would be liable to the depositor for having paid the check which the depositor did not draw, and Griffith would be liable for obtaining from the bank the difference between the amount of the check as originally drawn and the check as altered by him, and then he would be guilty of obtaining money to the value of this difference under false pretenses if at the time you should find beyond a reasonable doubt that he knew the check was forged or altered at the time he presented it."

That a person may be guilty of obtaining money by false pretenses by means of a forged check is well settled. See *Wharton on Criminal Law*, Eleventh Edition, Section 1427, and cases cited in Note 1. Of these cases, *Reg. v. Prince*, L. R., 1 C. C., 150; *Com. v. Stone*, 4 Met., 43; *Com. v. Nason*, 9 Gray, 125; *Tyler v. State*, 2 Humph., 37, bear out the text.

The jury had the right under the evidence and charge of the court to find the defendant guilty as charged on any or all of the counts in the indictment. If the jury saw fit to find the defendant guilty under the third count, which carries with it a much less penalty than that under the other counts, that was its privilege.

Another ground of error which is strongly pressed upon the court is in admitting testimony of the witness Darby in rebuttal, it being claimed by the defendant (1) that there was no evidence to rebut, and (2) that the evidence given was secondary evidence.

When the witness Sexton was on the stand for the state, the court permitted the defense, over the objection of the state, to cross-examine the witness to ascertain whether the amount of the forged check was included within the embezzlement charge. This was done for the purpose of testing the credibility of the witness, who had testified that the check was in the sum of \$1,597.30 at the time that he signed it. The defense in its case offered no evidence whatsoever to show that this amount was included within the embezzlement charge.

1915.]

State v. Griffith.

At the conclusion of all the evidence a special charge was requested by the defense, instructing the jury to return a verdict of not guilty on the third count if the amount was included within the embezzlement charge. The state then asked permission to call a witness to show that the amount of the check was not included and the witness Darby was permitted to take the stand over the objection of the defense.

The re-opening of the case and permitting the witness to be called was purely within the discretion of the court, and in the court's opinion is not such an abuse of discretion as to justify granting a new trial.

Under the view that the court took of the third count of the indictment, the testimony of the witness Darby (conceding, for the purpose of argument, that his testimony that the amount of the forged check was not included within the embezzlement charge was secondary) was entirely irrelevant, therefore, if it was error to admit this evidence it was not prejudicial.

As stated above, the court charged the jury on this third count that the defendant could not be convicted unless the check was forged. The charge was obtaining money by false pretenses on a forged check and was entirely different from the embezzlement charge.

The last ground of error that was argued at length was the claim that the court erred in ruling out the evidence of the witness Sykes, who had been called as an impeaching witness.

Sykes was called by the defendant and after having testified that he knew the witness Sexton for five or six years, that he had known him all over the country and that he had been working with him on the new hospital work in the city and in Texas, was asked the following questions:

"Q. Do you know what his reputation is for truth and veracity, Mr. Sykes—answer yes or no? A. Yes, I do.

"Q. Is it good or bad? A. Well, with me it has been bad."

Counsel for the state objected and moved that the preceding answer be stricken out and the court sustained the motion and instructed the jury to disregard it, to all of which counsel for defendant excepted.

It is claimed that this is prejudicial error.

There can be no doubt that if the witness had answered that the reputation was bad, that it would have been error to have granted this motion. But only one construction can be placed upon the answer of the witness: "Well with me it has been bad," namely, that as far as the witness was personally concerned that his individual opinion was that it was bad.

In *Cowan v. Kinney*, 33 Ohio St., 422, the Supreme Court says that—

"When the testimony of a witness, called to discredit another for truth, shows that he is testifying from his personal knowledge and not from the general reputation of the person whose testimony is sought to be discredited, it is not error to exclude it. It is error, however, to reject the testimony when the answer of the witness manifestly shows he testified from a knowledge of the general reputation of such person for truth and veracity."

The general rule regarding impeaching witnesses is to ask the witness whether he knows the general reputation for truth and veracity, and after he answers that he does to ask him whether it is good or bad, and then if he answers that it is bad the witness is permitted to be asked whether he would believe him under oath. *Craig v. State*, 5 Ohio St., 605; *Hillis v. Wylie*, 26 Ohio St., 574.

In this latter case the Supreme Court says:

"Where a witness acquainted with the reputation of another for truth and veracity, testifies that such reputation is bad, he may be allowed to further testify that from such reputation he would not believe the witness sought to be impeached under oath. The object of such testimony is not to introduce as evidence the opinion of the impeaching witness as to the truthfulness of the witness against whom he testifies, but to enable the jury to ascertain the true character of such reputation as the impeaching witness understands it, and thereby determine the extent to which it ought to discredit the witness." See also, *Burklin v. State*, 20 Ohio, 18.

It will be noticed that the witness Sykes did not testify that the reputation of the witness Sexton was bad, but only that with him it was bad. This, under the ruling of *Cowan v. Kinney*, *ubi supra*, was incompetent.

1915.]

McPherson v. Gillespie.

The court, as appears from the record, informed counsel that there was a proper way of putting questions to an impeaching witness and gave counsel the opportunity to put the questions in a proper way. Counsel did not see fit to avail themselves of this opportunity, neither did they make any proffer of what they expected to prove by the witness after the sustaining of certain objections.

It is contended in the assignments of error that the court erred in permitting the prosecuting attorney in his argument to comment upon the fact that the defendant had not taken the witness stand, and that the court erred in its charge to the jury in referring to this matter.

Under the amendment to the Constitution, adopted in September, 1912, the prosecuting attorney is permitted to comment upon the failure of the defendant to take the stand, and this ground of error is not well taken.

I do not think that the verdict is manifestly against the weight of the evidence and I am loath to set aside the verdict of the jury for that reason.

Motion for a new trial is therefore overruled.

EXCEPTIONS TO THE REPORT OF A RECEIVER.

Common Pleas Court of Franklin County.

J. W. McPHERSON V. GILLESPIE & COMPANY ET AL.

Decided, October 8, 1915.

Priority—Not Afforded by an Unrecorded Bill of Sale—Or by an Assignment by a Contractor of Unpaid Estimates, When—Receiver Charged with Amount of note thus Secured and Paid by Him—Exceptions to Expenses of Receiver.

1. A bill of sale given to secure a loan is in effect a chattel mortgage only, and where not filed for record creates no lien on the property covered and has no validity as against creditors of the party by whom it is executed.

2. An assignment by a contractor of unpaid estimates on work in progress is of no validity as against the claims of laborers employed on the work or of sub-contractors and material-men.
3. The payee of a note executed by an employee of the contractor, the proceeds of which were used in prosecuting the work, is a creditor of the maker of the note and not of the contractor to whom the money went, and the maker of the note is only a common creditor of the contractor.
4. A receiver will not be permitted to charge auto hire in going to and from the work he is completing, where no emergency was shown to exist; but he is entitled to pay out of the proceeds of the estate the premium on the bond which he was required to furnish.

Belcher & Connor, for plaintiff.

N. W. Dick, O. R. Crawfords, Eagleson & Eagleson, M. E. Thrailkill, Webber, McCoy & Jones, Turner & Sherman and S. R. Bolin, for the creditors.

BIGGER, J.

Heard on exception to the report of L. J. O'Donnell, receiver.

The first exception taken to the account is that it shows a payment of \$96.69 to Jones & Company, which it is claimed was not paid. Upon the hearing it was admitted that this claim on the part of exceptors was a mistake, which disposes of that exception, and the exception is overruled.

The second objection to the report is that it shows that on October 17th Joy H. Hunt was paid \$1,050, which is not accounted for in his report. With reference to this item of the account, the following is disclosed by the evidence to be the facts: One J. W. McPherson, who was an employee of Gillespie & Company, borrowed from Joy H. Hunt the sum of \$1,000; the additional \$50 being a commission allowed to Hunt for furnishing the money. It is claimed that this money was used for the payment of the men engaged on the contract of Gillespie & Company. The testimony of Mr. Hunt himself is clear and explicit that the note given for this money was the individual note of McPherson. To secure this note, it is in evidence that some paper writing, denominated a bill of sale, was executed and signed by both McPherson and Gillespie, covering the equipment used by Gillespie

1915.]

McPherson v. Gillespie.

& Company; and in addition to that an assignment to Hunt of unpaid estimates sufficient to cover his claim. Whether or not this assignment was in writing does not, I think, appear from the evidence, nor in the view I take of it is this material. This so-called bill of sale was clearly in effect a chattel mortgage only, as it was given simply to secure the loan of money. There is no evidence that it was filed as required by law to give it any validity as against the creditors of Gillespie & Company. There was, therefore, no lien created on the property covered by it.

As to the assignment of the estimates, this was of no validity as against the claims of laborers employed by Gillespie & Company, or as against the sub-contractors and material men of Gillespie & Company.

Section 8334, General Code, provides that:

“An assignment or transfer by such head contractor or sub-contractor of his contract with the owner or head contractor, as well as all proceedings in attachment or otherwise against such head contractor or sub-contractor to subject or encumber his interest in such contract, shall save and be subject to the claims of every laborer, mechanic, sub-contractor or material man who furnished any labor, machinery, fuel or material toward the construction, alteration, removal or repair of any building or other property designated in this chapter.”

It was decided in the case of *Franklin Bank v. City of Cincinnati*, 8 N. P., 517, that this section gives priority to sub-contractors over an assignee to whom an assignment had been made under the contract to secure money to carry out the contract. This decision was by Judge Dempsey, and exhibits the usual exhaustive and thorough consideration and clear and logical statement which characterizes all the decisions of that able judge; and I think there can be no question as to the soundness of his conclusions. Even if the loan had been made by Hunt to Gillespie & Company, Hunt could not claim a right under this so-called assignment to pro-rate with the sub-contractors and material-men of Gillespie & Company. He can not claim anything by reason of the bill of sale, as I have said. That an unfiled chattel mortgage has no validity as against other creditors was decided in *Thorn v. Bank*, 37 O. S., 224; 13 O. F. D., 255; 40 St., 569.

"A receiver represents all the creditors, and against him in such capacity an unfiled chattel mortgage has no priority." *Bain v. Pottery Co.*, 12 O. F. D., 301.

But Hunt was not a creditor of Gillespie & Company, on the undisputed evidence in this case. The fact that he may have loaned the money to McPherson with knowledge that McPherson was going to loan it to Gillespie to be used by him can not make any difference.

It appears from the undisputed evidence that McPherson, the plaintiff, in this action brought his suit upon this very note, and obtained judgment upon it; which, so far as the evidence shows, stands unreversed and in full force and effect. Instead, therefore, of Hunt being a creditor of Gillespie & Company, McPherson is the creditor; and it is the duty of the receiver, who was appointed in this action upon the application of McPherson, to pay the plaintiff's judgment if he has sufficient funds to do so. Hunt, it is clear, must look to McPherson for payment, and can not take satisfaction of his claim out of the funds due under this contract, which belong to the creditors of Gillespie & Company. If this were a question only between Hunt and McPherson and Gillespie, it might present a different case; but as against the creditors of Gillespie & Company, Hunt was not entitled to receive payment at the hands of the receiver from the funds derived from this contract; and therefore the court can not allow this as a credit to the receiver against the objections of the creditors of Gillespie & Company. The claim of McPherson itself is only that of a common creditor of Gillespie & Company, and his claim in distribution must be postponed to any material-men and sub-contractors of Gillespie & Company who may have perfected mechanics' liens; for McPherson has no lien on the funds of the receiver. The exception, therefore, to this item of \$1,050 must be sustained; and it can not be allowed as a credit to the receiver, but he must be charged with this amount in favor of the excepting creditors.

The next exception is that \$747.43 was paid to the Portland Cement Company, which was not authorized by law. In my opinion this exception can not be sustained. It appears that this

1915.]

McPherson v. Gillespie.

amount never came into the hands of the receiver, but that it was paid on the order of the court by the county commissioners directly to the Portland Cement Company. I am unable to perceive upon what principle a receiver can be charged with this under the circumstances, and none has been pointed out by counsel. Whether the payment was authorized by law or not is another question; but it appears that the court which appointed the receiver ordered the payment of this amount by the county commissioners, and I can not understand upon what principle the receiver can be charged with it.

The fourth objection is that the report shows the payrolls in gross, without itemizing to whom they were paid, and for what. There is no law which would require a receiver to include such details in his report; and unless it appears that these payrolls do not actually represent the money paid out, this is not a valid objection to the report.

It must be said that this receivership was managed in a very careless manner. The receiver, it appears, made no inventory of the property which came into his hands upon his appointment, and he was unable to state when inquired of what the completion of the contract had cost him; and in a general way it appears he failed to keep such an account of his proceedings as he should have kept, and was therefore unable to give much information as to the details of the work. But it appears from his testimony that he did keep an account of the amount of money paid out to the workmen on the job, and no evidence has been offered to dispute the correctness of his account in this respect; and this objection must be overruled.

The fifth and last objection is that there are various other irregularities appearing on the face of the report. Under this general objection the creditors object to the item of \$26.40 paid for auto hire. This objection must be sustained. It appears from the evidence that there were abundant facilities for reaching the site of this bridge by rail. The receiver does not claim that this expense was incurred by reason of any emergency suddenly arising. Such expenditure of the funds coming into his hands can not be approved by the court. It was his duty to conserve every dollar possible for the benefit of these creditors; and

the court can not put the stamp of approval upon such an unnecessary expenditure of money as this. He says this was for two or three trips. Giving him the benefit of three trips, he is only entitled to the fare by rail to the nearest station for these trips, instead of the amount he claims. This does not appear from the evidence; but he would be entitled to that amount, if counsel can agree upon it.

An item of \$14.88 for rubber boots is objected to. I do not think this objection is well taken. Ordinary working men are hardly to be presumed to be equipped with wading boots; and if these became necessary in the progress of the work I do not see that it was an unnecessary expense to provide them, nor that it was the business of the laborers to provide themselves. This objection is overruled.

As to the objection to the Barthman claim being paid in full: the receiver testified that was a claim which he contracted himself; and as the receiver will now have money to pay his own creditors in full, I see no reason for objecting to the payment of Barthman in full.

As to the claim that the Middle State Construction Company owes the receiver, the receiver testified, as I understand him, that he has charged himself in his account with all that the Middle States Construction Company owes him; and that disposes of that objection.

With reference to the load of crushed stone, which it is said is at the bridge site, the receiver should sell that and convert it into money if it can be sold.

As to the objection to the payment of the premium of \$77.10 to the surety company on the bond which the county commissioners required the receiver to furnish them, I do not think the receiver can fairly be charged with that. In my opinion it was within the power of the county commissioners for their own protection against liens to require this bond. This objection must be overruled.

Objection is also made to the amount paid the Middle States Construction Company for supervision at seven dollars per day. The receiver testifies that this is the price paid by all concerns engaged in erecting bridges for a superintendent on the job.

1915.]

McPherson v. Gillespie.

There being no testimony to the contrary, this objection must be overruled.

There is no objection, so far as I can find, from the evidence, that the work was not done according to contract, and in a workmanlike manner, showing proper superintendence.

I do not think the evidence sufficient to show that the receiver has not charged himself with the sacks returned. He testifies that he has charged himself with it.

As to the attorney's fees paid, I have some doubt whether the services of an attorney in this case were worth \$100; but as the court does not intend to allow any further fees either to the referee or his attorney, the objection to that item will be overruled.

This seems to dispose of the specific objections made to the report.

The receiver is instructed that he should pay first the court costs, and then his own creditors in full; as when he receives the money from the commissioners which is still due he will be in possession of sufficient funds to pay all his own creditors in full, since he must be charged with the \$1,050 paid to Hunt.

I may say in passing that under the law the receiver would doubtless have the right to recover this money from Hunt. Hunt's claim is against McPherson, to whom he loaned the money; and if this money thus loaned by McPherson to Gillespie & Company is lost in whole or in part, the loss must be borne by McPherson, and not the preferred creditors of Gillespie & Company. I may add that it appears from the evidence that McPherson's note has never been delivered to him, but was at the time of the trial in the possession of the receiver, and was marked as Exhibit 17 in this case.

Furthermore, as to the claim that in some way this money which Hunt furnished was a preferred claim on the fund in the hands of the receiver because it was used to pay the laborers, there is no evidence before the court as to what use was made of it. Gillespie was not called as a witness, and no person who testified had any knowledge as to what use was made of it, except on hearsay.

It appears from the report that the receiver paid certain claims of Gillespie & Company in full. The court has already

decided that as to \$1,050 of this account, being the amount paid to Hunt, it was not a valid claim against Gillespie & Company. After deducting this, the balance of the claimants will be entitled to pro-rate in the balance left after paying the costs and receiver's creditors in full.

Of course, if any of the creditors of Gillespie & Company perfected a mechanic's lien, they should be given preference over the common creditors; and McPherson, who has a judgment in this case is only in the position of a common creditor.

I should add that counsel for the receiver make the claim in argument that as to \$264.66 of this indebtedness of Gillespie & Company which was paid in full by the receiver, it represented the claim of a judgment creditor who had seized the equipment upon execution, and that it was in the hands of a constable before the receiver was appointed, and that he had to pay that claim to obtain possession. I do not find anything in the evidence showing that fact; but if that be a fact, I am of opinion that that creditor can not be required to pro-rate with the other creditors of Gillespie & Company, for the reason that the receiver could only obtain the equipment to go on with the work by paying off that creditor; and that as to that claim it stands on an equality with the creditors of the receiver.

As I understand the law, where any of these claimants were given a preference over others in the same class, under the rules which I have announced, the receiver has a right to recover back from them such an amount as will make them equal with the others in their claims.

This I think covers the questions raised by the exceptions to the report, and furnishes a guide to the receiver in settling up the affairs of the receivership; and an entry may be drawn in accordance with this finding.

Moore v. Trust Co.

Common Pleas Court of Hamilton County.

Decided, October Term, 1914.

Where a decree of divorce is granted on the aggression of the wife, the fact that the allowance which is made to her is referred to in the decree as alimony does not change its character from an allowance made to her out of his estate, and so much thereof as remains unpaid at his death becomes a charge against his estate. (e. d. .)

NIPPERT, J.

It appears that the plaintiff, Harriet Moore, widow of John D. Moore, was divorced from John D. Moore by reason of her aggression, and the decree of divorce contains, among other matters, the following:

It further appears that John D. Moore, after the payment of four installments, died at the age of seventy-eight years, leaving an estate valued at about fifty thousand, (\$50,000) dollars, and Harriet Moore received no further payments on account of said

alimony since October, 1913. She filed her claim with the executor, who refused to pay the same, and now asks judgment against the said executor, the Central Trust & Safe Deposit Company, for the accumulated installments.

The demurrer raises a question as to the nature of this allowance; and, second, is this allowance an obligation resting against the estate of John D. Moore?

Under Section 11993 of the Code, if the divorce is granted to the husband by reason of the aggression of his wife, the court has no authority to order the husband to pay alimony to the wife; but "the court may adjudge to her such share of the husband's real or personal property, or both, as it deems just."

The court in the case at bar ordered John D. Moore to pay to Harriet Moore the sum of forty (\$40) dollars per month until the further order of the court, and in default of the payment of said sum at any time the sum should become a lien upon the property of Mr. Moore.

The fact that the allowance in this case was referred to as alimony in the decree of court can not affect the question of what the court had authority to do. The court had authority to adjudge to Mrs. Moore such share of her husband's estate as deemed reasonable. The court adjudged to Mrs. Moore the sum of forty (\$40) dollars per month until further order of the court and gave Mrs. Moore a lien upon Mr. Moore's property in case he defaulted in his payments.

The court therefore holds that the allowance made was not in the nature of alimony, but was an allowance, properly made under Section 11993, and is in full force and effect "until further order of the court." No other order having been made, it must necessarily follow that Mrs. Moore is entitled to her monthly allowance of forty (\$40) dollars heretofore granted, irrespective of the demise of John D. Moore, and the estate of said John D. Moore will be held liable for the payment of this allowance until further order of the court. See *Kelso v. Lovcjoy*, 9 O. C. C. (N.S.), 539, affirmed by the Supreme Court April 30, 1907; also *Fiesler v. Fiesler*, 83 Ohio St., 200.

The demurrer will therefore be overruled.

1915.]

State, ex rel, v. Fassig.

AN INVALID SECTION IN THE WORKMEN'S COMPENSATION ACT.

Common Pleas Court of Franklin County.

STATE OF OHIO, EX REL EDWARD C. TURNER, ATTORNEY-GENERAL,
ON BEHALF OF FRANK POND, v. PERCY FASSIG.

Decided, November 24, 1915.

Constitutional Law—Right of Trial by Jury Denied by Workmen's Compensation Act—Void Provision for Submission of a Judicial Question to an Administrative Board—Careful Employer Entitled to Benefit of His Exercise of Greater Care—Action Against Employer for Failing to Comply with Order of Industrial Commission Not Maintainable.

Section 27 of the workmen's compensation act (1465-74, General Code) is in contravention of the constitutional guaranty of right to trial by jury, and is therefore void and of no effect.

Edward C. Turner, Attorney-General, for relator.

F. C. Rector, for defendant.

J. F. Rogers and McGhee, Davis & Boulger filed briefs.

BIGGER, J.

The relator states in the petition that he is the duly elected, qualified and acting Attorney-General of the state of Ohio, and that he brings this action on behalf of Frank Pond, under and by virtue of Section 27 of the Workmen's Compensation Act of Ohio (103 O. L., 72). The relator states that the defendant is and was at the times complained of employing five or more workmen or operatives regularly in the same business, and in and about the same establishment in which the said Frank Pond was employed; that on or about August 22, 1914, said Frank Pond was injured in the course of his employment while in the service of said defendant; that said Frank Pond thereupon filed with the Industrial Commission of Ohio an application for compensation, which application was duly considered by said commission, and on December 22, 1914, a finding of facts and order

to employer was made, a copy of said finding of facts and order to employer being attached to the petition and marked Exhibit A and made a part of the petition. That on or about December 22, 1914, a duly certified copy of such finding of facts and order to employer was served upon the said Percy Fassig, who has wholly failed to comply with said finding and order, which required defendant to pay to said Frank Pond the sum of \$186.13 as compensation up to December 22, 1914, and covering a disability of 16 3/7 weeks.

Relator further says that on or about January 26, 1915, the case was again before the commission for hearing and was duly considered by the commission and an additional finding of facts and order to employer made, which is attached by copy to the petition, and marked Exhibit B and made a part of the petition. That on or about the 26th day of January, 1915, a duly certified copy of such finding of facts and order to employer was served upon the said Percy Fassig, who has wholly failed to comply with said finding of facts and order, which finding of facts and order required the said Fassig to pay an additional sum of \$40.46 as compensation, and \$78 for medical expenses.

The relator prays judgment on behalf of said Frank Pond against the defendant Percy Fassig for a total sum of \$417.88.

To this petition defendant has filed an answer. The first defense admits that the relator is the duly elected, qualified and acting Attorney-General of the state, and that he brings this action under and by virtue of Section 27 of the workmen's compensation act (103 O. L., 72); that the defendant was and is employing five or more workmen or operatives regularly in the same business and in and about the same establishment in which the said Frank Pond was employed. He admits that the said Frank Pond filed his application with the commission for compensation, and that the findings of facts and orders to the employer were made by the commission, as alleged in the petition; that the defendant has failed to comply therewith, and denies each and every other allegation in the petition.

For a second defense he says that if the said Frank Pond received any injuries as in the petition alleged they were not received in the course of his employment or while in the service

1915.]

State, ex rel, v. Fassig.

of the defendant, and were self-inflicted and solely the result of his own negligence, in that with an infected pin the said Frank Pond pricked his hand, as a result of which he suffered or claimed to have suffered an attack of blood poison, for which the defendant was in no respect responsible.

For reply the relator denies each and every allegation contained in the second defense of the answer.

The issue thus having been made up, the defendant filed a motion for judgment on the pleadings. It is the claim of counsel for defendant that Section 27 of the workmens' compensation act under and by virtue of which this action is brought, is in conflict with the Constitution of the state, and that the petition therefore states no cause of action against him. It is the claim of defendant's counsel that Section 27 of the workmens' compensation act is in conflict with Section 5 of Article I of the Constitution, which provides that, "The right of trial by jury shall be inviolate." This provision of the Bill of Rights of the Constitution of the state was guaranteed by the ordinance of 1787 to the people of the Northwest Territory, and was embodied in the Constitution of 1802 in practically the same language. It is needless to indulge in platitudes concerning the tenacity with which the English speaking people have insisted upon this right and the boldness with which they have upheld it against all encroachment of arbitrary power.

It is claimed, however, that the legislative authority for the enactment of Section 27 of the workmen's compensation act is to be found in Section 35 of Article II of the Constitution adopted in September, 1912, and which reads as follows:

"For the purpose of providing compensation to workmen and their dependents for injuries, death or occupational disease occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers and administered by the state, determining the terms and conditions upon which payment shall be made therefrom, and taking away any and all rights of action or defense from employees and employers. But no right of action shall be taken away from any employee when the injury, disease or death arose from failure of the employer to comply with any lawful requirement for the protection of the

lives, health and safety of employees. Laws may be passed establishing a board which may be empowered to classify all occupations according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund and to determine all rights of claimants thereto."

Prior to the passage of this amendment to the Constitution, the General Assembly had enacted a workmens' compensation act, but which did not contain the provision contained in Section 27 of the present act, and the Supreme Court decided that without this constitutional grant of power to the General Assembly, it already had such power in the exercise of the police power of the state. The court did not, however, have before it for decision the question of the right and power of the General Assembly to enact that in a controversy between two persons, and which does not at all involve the administration of the state insurance fund, one of the two persons may be compelled by law to submit to a board possessing only administrative powers the determination of a claim for damages which the other makes against him. The Supreme Court of the state of Ohio in the case of *State, ex rel, v. Creamer*, 85 O. S., 349, is not an authority upon the question of the constitutionality of Section 27 of the present act.

The question here presented is this: assuming that prior to the adoption of Section 35 of Article II of the Constitution, the defendant in this action was entitled to have the question of whether or not the plaintiff had suffered any injury and if so, what was its nature and extent, and the amount of damages to which he was entitled, submitted to and determined by the verdict of a jury, under instructions from the court as to the law in such a case, has the adoption of Section 35 of Article II taken away this right or in any manner abridged it?

A careful consideration of this provision of the Constitution fails to disclose any qualification or abridgment of the right of trial by jury, which has been one of the fundamental guarantees of our Constitution since its adoption and of the Constitution of 1802, and of the Ordinance of 1787, and the great charter of English liberty. Did the people of the state of Ohio, when

1915.]

State, ex rel, v. Fassig.

they adopted this article, have any reason to believe from its language that they were taking away or abridging the right to trial by jury which they and their ancestors had inherited from the mother country and which they had zealously preserved and perpetuated in these great instruments? If there had been any purpose in the minds of those who framed this article to take away or abridge this right to a trial by jury, we would naturally expect to find it in unequivocal language, so that he who runs might read it. What particular language contained therein can be pointed out as abridging this right if such right exists? The Attorney-General, in his brief, underscores this language: "And taking away any and all rights of action or defenses from employees and employers." Plainly, that refers only to the case of such rights when the employer has paid his proportion to the state insurance fund. Was it intended to authorize the General Assembly to take away from an injured employee, when his employer had not paid his proportion to the fund, any and all right of action which he would have had against his employer but for the act? No such construction as that of this language is permissible. This section of Article II simply empowers the legislative branch of the government to create a state insurance fund for the benefit of workmen who are injured in the course of their employment, and to compel employers to contribute their proportionate share to the fund to determine the conditions on which such payment shall be made, to establish a board which shall collect and administer the fund and which board may be authorized to classify all occupations according to their degree of hazard, and to fix the rates of contribution to the fund in accordance with such classification and determine the rights of claimants to share therein.

There is in this section no warrant for legislative enactment that in a matter not affecting the fund and having no relation to fixing the amount to be paid by the employer into the fund, nor the collection of such amount for the benefit of the fund, that the commission in an action for damages between employee and employer may hear and determine whether a complainant is injured, and, if so, whether he received his injuries in the course

of his employment, and the nature and extent of the injuries, and then determine the amount under and in accordance with a scale of compensation fixed by legislative enactment, and order the employer to pay it for the benefit of the employee. It is plain, therefore, that if this power resides in the General Assembly, it must be found elsewhere than in the provisions of Section 35 of Article II of the Constitution. It is always to be kept in mind, in determining whether the General Assembly has exceeded its powers, that the Constitution vests the entire legislative power of the state in the General Assembly. The power of the national legislative body to legislate, unlike that of the state legislative body, is to be found only within the grant of legislative power contained in the Constitution of the United States. But our Constitution vests the entire legislative power of the state in the General Assembly. Therefore, when the question is presented to the court as to whether or not the General Assembly has exceeded its powers of legislation, the inquiry is not, has the power been granted to it, but it is restrained by the Constitution itself from exercising the power attempted to be exercised?

The Constitution does, in important respects, limit the General Assembly in the exercise of legislation. And one of the important limitations upon the exercise of the power of legislation is found in Section 5 of Article II, which provides that "The right of trial by jury shall be inviolate." Keeping in mind this restriction upon the General Assembly in the exercise of the power of legislation, does this section of the workmen's compensation act constitute a violation of the constitutional right of the defendant to a jury trial? And in approaching a decision of this important question, the court does not lose sight of the fact that it is an established rule, firmly settled by numerous decisions of courts and declarations of text-writers that a statute will not be declared unconstitutional in case of doubt, but will be sustained unless clearly unconstitutional. Furthermore, a statute will not be declared unconstitutional if the case can be disposed of on any other tenable ground. But the only contention here made by the defendant is that he is not liable for the reason that the section of this act under which it is sought

1915.]

State, ex rel, v. Fassig.

to hold him liable is a violation of his constitutional right to a trial by jury, and the petition states no cause of action against him, unless a statement showing his compliance with Section 27 of the workmen's compensation act, and the finding and order of the commission and the failure of the defendant to comply with the order is sufficient to show a right of action. The court, therefore, can not dispose of the question by the motion for judgment in his favor otherwise than by passing on the constitutionality of this section.

No more solemn duty can rest upon a court than that of upholding and defending the Constitution. Every judge of this state, before taking office, is required to take an oath that he will uphold the Constitution of the United States and the Constitution of the state of Ohio. This means that he will uphold it from attacks made upon it from any source. But it is always to be presumed that the General Assembly will pass no law which will be in violation of the Constitution, as the legislator equally with the judge is under oath to support the Constitution. This presumption, like that which the law entertains as to the innocence of one accused of crime, is to remain until the court is convinced beyond a reasonable doubt that an act of the General Assembly, the constitutionality of which is drawn in question, is unconstitutional.

Respecting the duty of a court under such circumstances, Judge Ranney said in *C., W. & Z. R. R. Co. v. Commissioners of Clinton County*, 1 O. S., 77, at pages 82 and 83:

"To adjudicate upon and protect these rights and interests, constitute the whole business of the judicial department. Each judge, before he is permitted to enter upon so important a duty, is required to bind his conscience by a solemn oath to support these constitutions. After all this, when he is clearly convinced their provisions have been violated, and the rights of the individual secured by them have been invaded by a legislative enactment, he has but one of two courses to pursue, either to regard his oath, vindicate the fundamental law and protect the rights of the individual citizen, or to give effect to an act of usurped authority. In such case, it can not be doubtful where the path of duty leads. The latter alternative can only be followed when we are to nullify all constitutional guarantees and

proclaim the legislative body, like the British Parliament, omnipotent. For, as stated by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch, 137: 'To what purpose are powers limited, and to what purpose is that limitation committed to writing if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation?' "

The question then is, does Section 27 of this workmen's compensation act violate the constitutional guaranty to the defendant of the right of trial by jury in this case? And the first question, naturally, which arises is this. Has the defendant under the Constitution a right to a trial by jury of the right of Frank Pond, on whose behalf this action is prosecuted, to recover damages from him by reason of alleged injuries suffered by the said Frank Pond while in his employment? It is not every controversy that arises between individuals that must be tried to a jury. There is a large class of cases to which this constitutional guaranty has no application. In the Common Pleas Court of Franklin County one of the six judges is continually engaged in the trial of cases in which no right to a jury trial exists under the Constitution. When, therefore, in a given case a party asserts that under the Constitution he is entitled to a trial by jury, how is this question to be determined? This question was long ago decided in Ohio, and the same question has often been decided under the constitutions of other states in the same way. In the case of *Wilyard v. Hamilton*, 7 Ohio, 2d part, 111-118, it was decided under the Constitution of 1802 that:

"The only way in which we can ascertain the true meaning of this clause is by making inquiry whether before the Constitution was framed, jury trial was known in such cases in the territory of Ohio."

In the case of *Hagany v. Cohen*, 29 O. S., 82, the Supreme Court said, in deciding upon the constitutionality of a statute which it was claimed was in conflict with this provision of the

1915.]

State, ex rel, v. Fassig.

Constitution, "Nor is the statute in violation of Section 5 of Article I, which provides that the right of trial by jury shall be inviolate. The right thus secured was such as was recognized by the common law." Was the right of trial by jury, where one person sought to recover damages of another for a personal injury, recognized as a right before the adoption of the Constitution of 1851, and at the common law? Of this there can be no doubt. Under the Constitution of 1802 an action brought by one to recover damages, whether for injury to person or property, was triable by jury. It is only necessary to refer to the decisions of the Supreme Court embodied in the twenty volumes of Ohio Reports decided under the old Constitution in support of this statement. This was true in an action brought by an employee against his employer to recover for injuries due to the negligence of the employer. *Little Miami Railroad Co. v. Stevens*, 20 O., 415.

That it was the settled rule in such case at the common law is equally clear. We trace our rule of compensation for injury by award of damages to the Anglo-Saxon law. And at an early period it became an established rule that these damages were to be assessed by a trial by jury. On this subject, Sedgwick says, in his work on damages, at Section 17:

"At all events, at the period of the earliest systematic records of judicial proceedings in England, the jury had become the tribunal which disposed of the question of fact, and the amount of damages became a principal part of their jurisdiction."

The jury was not confined to a mere question of determining the fact of liability, but it was a principal part of the functions of the jury to determine the quantum of damages also. On this subject Sedgwick says at Section 9: "The quantum of damages being in most cases intimately blended with the questions of fact, must have been from the outset generally left with the jury."

To this there was and is now a well settled exception, and that is that on default the court itself might assess the amount of damages to be awarded. On this subject Sedgwick says:

"Yet, on the other hand, the old books are full of cases, where, on judgment by default and even on demurrer, the courts themselves fix the amount of damages; and the remains of this we see in the power still exercised by the English courts in cases of *mayhem*."

It may be observed in passing that the remains of this may be found in our statute law, Sections 11952 and 11954 of the General Code, which provide that upon default for answer the court may hear the proof and assess the damages or refer the case to a referee or master for such purpose or direct the matter to be ascertained by a jury as the action requires. It seems that in the early laws of the Anglo-Saxons the quantum of damages was arbitrarily fixed by the law maker, and this was true in some of the most ancient legal codes. There were similar provisions in the Jewish law. On this subject Sedgwick says at Section 9:

"It is a curious fact that the laws of remote and barbarous periods show the most minute care in fixing the amount of compensation to be recovered by way of damages."

This list of personal injuries was most minute as far back as the sixth century, fixing a certain amount as compensation to be recovered for pulling the hair, a certain other amount if the scalp was injured. It fixed the amount to be paid for the loss of a front tooth, and another amount for the tooth next to the front tooth, and a certain amount for the great toe nail, and a certain amount less for the loss of every other toe nail. This simply illustrates the great minuteness of the law as to the compensation to be paid in personal injury cases under this ancient law. With reference to this classification of personal injuries by the law making power, Mr. Sedgwick observes at Section 11:

"Perhaps this is evidence of a civilization gradually increasing, and a jurisprudence slowly improving; for feeble certainly, and unreliable, must be the tribunal charged with the task of imposing damages in civil suits, if the legislator considers it unsafe to be trusted with the assessment of the amount. This

1915.]

State, ex rel, v. Fassig.

elaborate and minute specification, therefore, though on its face appears to indicate the care and watchfulness of the law giver, on a closer examination furnishes a stronger proof of his distrust of the judiciary. Arbitrary rules, which do not bend to the justice of the particular matter, especially when used to fix values, are always a misfortune and a defect in jurisprudence; they should never be tolerated, unless on account of some peculiar and extraordinary difficulty in arriving at the truth of the individual case."

It thus appears that from an early period in the history of the common law in actions for the recovery of damages for personal injuries they were assessed by a jury under instructions from the court as to the law applicable to the particular case. The Supreme Court has already decided that in the administration of this fund, the commission acts only in an administrative capacity. But, after the most pains-taking investigation, I have been unable to find any authority anywhere for the view that an administrative board may hear and determine a claim for damages before default, and assess the amount of damages to be recovered, leaving only to a court and jury the question of general liability. If this power may be exercised by a commission in the case of some controversies of this character between employer and employee, why not in all? Indeed it would seem that it would be a more equitable system if the General Assembly, after prescribing the amount of compensation to be recovered for particular injuries, had made the provisions of Section 27 applicable to all cases where an employee sought to recover damages from his employer. Under the present system, which creates a general insurance fund out of which claims are to be paid, the careful employer is required to pay as large an amount as the most negligent. But under the provisions of Section 27 the careful employer would derive the benefit of his exercise of greater care in the lesser number of injuries for which he would be held liable, which incentive to care is wanting under the system of contribution in proportion to the number of employees. The General Assembly evidently had some doubt of the constitutionality of this method of determining the right of an employee, as between himself and his employer, to dam-

ages; for it undertook to provide for a trial in court in case the employer should refuse or neglect to make payment in accordance with the finding or judgment of the commission. But what is the nature of the trial which is to be had in court? Upon the trial in court the statute provides that the amount found and determined by the commission "shall constitute a liquidated claim for damages against such employer in the amount so ascertained and fixed by the board." This, of course, precludes any inquiry in court as to the nature and extent of the injuries and as to the amount which should be allowed in damages therefor. We have here, then, an attempt by a legislative enactment to divide between a mere ministerial body and the court the determination of questions which at the time of and long prior to the adoption of the Constitution of 1851, had been performed exclusively by the courts, that is, by a jury in court under the direction and instruction of the judge as to the rules of law which should govern the jury in assessing damages. When the people of the state provided in their Constitution that the right of trial by jury shall be inviolate, this meant the right to a trial by jury as it had long existed, and this, as we have seen, was the right to have the jury pass upon and decide the nature and extent of the injuries and assess the amount to be allowed therefor under the direction of the court as to the rules of law which should govern them in such cases. Shall the court, therefore, hold that a legislative act which takes from the jury this power, does not violate this constitutional guaranty? It is beyond the legislative power to either take away or abridge this right in those cases where it existed antecedent to the adoption of the Constitution. If it may be abridged by taking away a part of the functions of the jury, why may not all be taken away by legislative enactment? Is it any less important to one who is sued for damages to have the jury pass upon the nature and extent of the injuries of the plaintiff and assess the amount to be recovered therefor, than to have them pass upon the question of his liability? But whether of greater or less importance, it is sufficient to say that the right of trial by jury as it existed prior to the adoption of the Constitution was the right to have

1915.]

State, ex rel, v. Fassig.

those questions submitted to and decided by a jury, and that this right of the defendant in this case thus guaranteed by the Constitution can not be and has not been affected by the enactment of Section 27 of the workmen's compensation act. While the question of the constitutionality of this section does not seem to have been decided as yet in Ohio in any reported case, we are not left to travel an unbeaten path, for the courts of last resort in this country have had under consideration the validity of legislative acts claimed to have violated this constitutional right and which very clearly are in point as to the facts involved and the principle announced. It is true that not many reported cases are found where the constitutionality of a legislative act which undertook to divide between a merely ministerial body and the court the decision of the right of a party to recover damages from another has been drawn in question. The paucity of such decisions it is fair to assume is due to the fact that the constitutional right to a jury trial in such cases is so clear that legislative bodies have very seldom undertaken to enact such legislation.

In the case of *King v. Hopkins*, 57 N. H., 334, it was decided by the Supreme Court of that state that:

"That part of Section 13, chapter 97, of the laws of 1874, which provide that upon a trial by jury of a case which has been referred under the act the report of the referee shall be evidence of all the facts stated therein, subject to be impeached, and so much of Section 3, chapter 35, of the laws of 1875 as makes provision to the same effect are unconstitutional and void."

In that case the finding of the referee was only made evidence of the facts subject to be impeached, while in the case at bar the findings of the commission are not subject to be impeached, but are conclusive on the jury, and yet it was held this was an invasion of the right of a party to have a jury trial by the course of the common law. The judge delivering the opinion in that case says:

"And when my brother Ladd inquires whether the people of New Hampshire in 1792 intended to secure for themselves and

their posterity nothing more than a trial in which judgment should be rendered on the verdict that 'the jury find that the auxilliary decision is not shown to be wrong,' I am compelled to confess that I see but one answer that can be given to the question without doing violence to all ideas of a legal and all sense of a constitutional character. If the constitutional jury trial is no more than that, it is nothing at all; for the legal substance of jury trial (in whatever sense it is understood) may be abolished by a great variety of ingenious statutes. If a jury can be compelled to give their verdict, not upon the issue between the parties, but upon the question whether an auxilliary decision of that issue is right, giving to that auxilliary decision, as evidence of its own correctness, such weight as the Legislature choose to prescribe, the constitutional guaranty of jury trial is a delusion; and if that guaranty can be repealed by legislative circumlocution, every other constitutional guaranty is a constitutional farce."

By the statute of the state of Montana, a railroad company was made liable for killing live stock which might stray upon its track, and the act provided that the owner might file an affidavit stating his ownership with an officer or agent of the company and that thereupon each party should select one appraiser, and the two thus appointed should select a third, who should appraise and fix the value of the stock killed. The statute then provided that the railroad company should pay to the owner the amount thus fixed or determined by the appraisers, and if within thirty days the company did not make payment, suit might be brought in any court of competent jurisdiction, and upon trial the appraisement was to be taken as conclusive evidence of the value of the stock. This was held to be a violation of the constitutional right to a trial by jury. In this case, like the one at bar, the law made the findings of the appraisers conclusive upon the jury.

In the case of *Plimpton v. Somerset*, 33 Vt., 283, it was decided by the Supreme Court of that state that:

"Any law which materially impairs the right of trial by jury according to the course of the common law, in cases proper for the cognizance of a jury, is contrary to the twelfth article of the Bill of Rights and Section 31 of the Constitution of

1915.]

State, ex rel, v. Fassig.

Vermont. These constitutional provisions apply to all controversies to be tried by a jury according to the rules of the common law, notwithstanding the particular right for the violation of which the action is brought, did not exist by common law, but was created by a statute passed subsequent to the adoption of the Constitution. The act of 1856, providing for a compulsory reference of suits at law, and which makes the referee's report *prima facie* evidence of the facts therein reported, in case either party claims a trial by jury, does, so far as it applies to actions suitable for trial by jury according to the course of the common law, impair the right to such jury trial as is guaranteed by the Constitution of Vermont, and it is therefore void."

The General Assembly in this act recognizes the controversy between the plaintiff and defendant as one fit and proper to be tried by a jury, for it expressly provides that an injured employee may bring an action in court to recover damages from the employer when the employer fails to pay his proportionate share to the insurance fund, where, of course, such cases have always been tried to a jury. The same principle is involved in all those cases where a compulsory reference has been made in purely legal actions for the determination of questions of fact, and it has uniformly been held by courts of last resort that such reference is an infringement of the constitutional right to a trial by jury.

In the case of *Cutler & Hinds v. Richley*, 151 Pa. St., 195, it was decided that:

"The local act of April 6, 1870, P. L., 948, providing a special voluntary mode of procedure before a single legal arbitrator learned in the law, without right of appeal, is constitutional; but the supplement of March 25, 1873, P. L., 396, substituting in lieu of the voluntary a compulsory mode of procedure, is unconstitutional." See also *United States v. Rathbone*, Federal cases, No. 16121; *Kinkead v. Hiatt*, 24 Neb., 562; *Kuhl v. Pierce Co.*, 44 Neb., 584; *Bornheim v. Waring*, 79 N. C., 56.

It can not be claimed that because the industrial commission is clothed with power to administer the state insurance fund, in the discharge of which duty it acts in a purely administrative and ministerial capacity in deciding facts necessary to be

determined in the administration of the fund, that this will authorize the General Assembly to confer upon it judicial powers and authorize it to usurp the province of a jury in an action at law for damages. This provision of this act is in no wise connected with the duties of the industrial commission in the collection and disbursement of the insurance fund. When the industrial commission determines the right of an applicant to share in the fund, it acts purely in a ministerial capacity. It makes no judicial finding against any citizen in any controversy between him and another, the effect of which is to fix upon him a legal liability to pay damages. The first power it may rightly exercise, the second it may not.

The workmen's compensation law is one of the most beneficent acts passed by the General Assembly of this state in recent years. It is in no wise weakened by this ruling, the only effect of which is to require an injured employee who is not entitled to share in the fund under the terms of the act, to bring his action against the employer in the courts where the employer may have a trial by jury, a right guaranteed him in the Constitution.

I have not considered the question whether this section is in violation of other provisions of the Constitution, as the only contention made on behalf of the defendant is that it is in violation of Section 5, Article I.

Having reached the conclusion upon mature consideration that this Section 27 of the act is void, it follows that the petition states no cause of action against the defendant, and for that reason his motion for judgment in his favor upon the pleadings must be sustained.

1915.]

Seidel v. Duncan.

PROCEEDINGS CONTESTING AN ELECTION.

Common Pleas Court of Franklin County.

JOHN F. SEIDEL v. ROBERT P. DUNCAN.

Decided, December, 1914.

Elections—Contest Proceedings—Claim that an Irregularity Exists Should be Stated with Definiteness—Order that the Ballots be Opened Will Not be Made, Unless—Recount Will Only be Made, When.

1. In proceedings under the statutes to contest the election of prosecuting attorney, though the grounds thereof need not be stated with the accuracy and definiteness of a pleading in a civil action, still it should be made to appear that an actual claim of irregularity exists, a mere general statement of claims without disclosing a special particular ground of irregularity being insufficient.
2. The court is not warranted in ordering the ballots in to be opened, where it is apparent that the contestant desires the same to be opened and to have a full recount made to discover errors that are not alleged and claimed.
3. The court has no power to open the ballots for an absolute recount before any testimony has been offered as required by statute which may tend to show errors in particular precincts.

John K. Kennedy, for plaintiff.

Franklin Rubrecht, contra.

KINKEAD, J.

This is a proceeding under Sections 5148, 5153 and 5090-1 of the General Code to contest the election of the above named contestee to the office of prosecuting attorney.

The charges are made in general terms, not particularly setting out specific errors claimed.

Notice has been served as required so that the contest proceeding may be properly considered as pending.

The notice is to the effect that the contestor will proceed to take depositions on the 14th day of December, before Homer Z. Bostwick and Elba W. McCormick, justices of the peace.

The matter now submitted to the court, December 5th, is a motion for an order—

1. That all of the ballots cast at the election held in Franklin county, Ohio, on the 3d day of November, 1914, for elective officers voted for at said election be brought into open court by the person or persons or board having custody thereof, and that said ballots be opened and recounted, and all errors in counting the same be corrected according to law as pertaining to the candidates for the office of prosecuting attorney.

2. That the court determine the time and place and a judicious and expeditious plan for opening and correcting all errors in counting said ballots according to law as pertaining to the candidates for the office of prosecuting attorney.

The only power and authority which the court has in contest of elections is derived from the statutes. All of the statutes are to be taken and construed together as constituting the entire scheme of the proceeding, without regard to the date of their enactment. The court can add nothing to the mode of proceeding provided by them; if they are not adequate to the purpose because of defects therein, this fact simply demonstrates the want of power of the court.

Section 5090 has to do with the official count, the matter of the preservation of ballots. The amendment to that section, being 5090-1 (103 O. L., 265), contains a provision as to what shall be done with the ballots in case of contest, viz:

“Provided that if any contest of election shall be pending, at the expiration of said time the said ballots shall not be destroyed until such contest is finally determined. In all cases of contested elections, the parties contesting the same shall have the right to have said ballots opened and to have *all errors in counting corrected by the court or body* trying such contest, but such ballots shall be opened only in open court or in the open session of such body and in the presence of the officers having the custody thereof.”

The proceeding to contest the office of prosecuting attorney, as prescribed by the statutes, is to be strictly followed according to the letter of the statute, or of any implied power clearly warranted therefrom.

Depositions are to be taken at the precise times specified, not less than ten days nor more than twenty days from the day of the service of notice of the contest. Section 5149.

1915.]

Seldel v. Duncan.

The justices may issue subpoenas for all persons who may be expected to testify, and subpoenas *duces tecum* for books, papers, ballots or things relating to the election. Section 5150.

The provision for subpoenas for ballots can not have relation to the ballots as is requested by the motion now submitted, for the reason that original Section 5090 and as amended Section 5090-1 contain specific and strict provisions for securely sealing them with official wax impression seals in such manner that they can not be opened without breaking the seals, thus securing the secrecy of the ballot until they may be opened in open court for the correction of any errors in counting.

Provision against their ever being opened is "iron clad" even before they are burned.

So, in case of a contest, this amendatory law provides that the ballots shall be opened only in open court, and in the presence of the officers having the custody thereof.

It seems clear that it can not be contemplated that the ballots may be used as original evidence in the taking of testimony before the justices. It is also clear that it was not intended to have the ballots opened by the court before any testimony is taken, and before trial, and that the court itself, or by persons designated can not make an entire recount for the avowed purpose of discovering any errors and having them corrected. If such had been the purpose, definite provision would have been made.

The justices shall not receive testimony upon any point not named in the notice, according to Section 5151.

The "points" specified in the petition for contest and notice are—

1. That the ballots were not properly counted.
2. That all the ballots cast were not counted.
3. Ballots in favor of Sherman were rejected.
4. Ballots were counted for Duncan which should not have been.
5. Ballots were counted for Duncan that should have been counted for Sherman.
6. Sherman received more votes than Duncan.
7. The result announced and declared is not the true result.
8. There was improper, irregular and illegal conduct on the part of the election officials in the conduct of the election and

in making the count which prevented Sherman from having a correct count.

9. Ballots cast were not counted according to law.

It can not be expected that the grounds of contest of an election can be stated with the accuracy and definiteness of a pleading in a civil action, but it does seem that there ought to be some more definite and positive claim than the above, although the charges might be regarded as sufficient to lay the foundation for an investigation and the introduction of evidence in the regular way pointed out by statute. But they certainly can not be regarded sufficient to warrant the court, before trial, to open all the ballots in all the precincts and designate persons to make an entire recount. If the court would do so, it would be assuming legislative functions.

It will be conceded that the original ballots are the best evidence, but there is no provision made for an examination of the ballots themselves in taking the testimony before the justices.

This court has no right or power to grant this motion by formulating some sort of a plan or scheme that might be deemed a judicious scheme for examining the ballots for the avowed purpose of ascertaining whether there were any errors, which is the prayer of the motion submitted.

True it is that Section 5153 authorizes the court upon motion of either party to at once take up and determine any matter relating to the contest. But it is without power to take up the matter of opening the ballots for an absolute *recount* thereof, before any testimony has been offered in the way pointed out for taking the same, which may tend to show errors in any particular precinct or precincts.

The court has no power, and is without the means of making an entire recount because there is no provision whatever made for such recount. *State, ex rel, v. Graves*, 12 Ohio Law Rep., 296 (90 O. S.), construing Section 5090-1, General Code (103 O. L., 265).

The amendment, Section 5090-1, contemplates that the court may open the ballots and correct all errors therein when *trying such contest*, while Section 5152 contemplates a trial at which time oral testimony may be offered, and depositions taken as provided in civil actions. This provision for the taking of depo-

1915.]

Seldel v. Duncan.

sitions, as in civil actions, is in addition to the statutory method of taking them before justices of the peace. It also contemplates that corrections may be made by testimony offered at the preliminary proceeding before the justices.

An election contest can not be converted into a recount. This court has no power to order the ballots opened up for an entire recount.

The general grounds for contest stated in the notice, and the requests by counsel made in court and the motion submitted, unequivocally call for an entire recount. There is no provision whatever to authorize any persons whatever to go over and examine the entire vote cast for the office of prosecuting attorney in order to discover evidence of errors.

The court would be making law violative of the secrecy of ballots which has not been made by the appropriate legislative body.

The proposition made by the motion that the court determine a time and place and a judicious and expeditious plan for opening and correcting errors, and the oral suggestion that an agreement be made to select five persons on each side to examine the ballots, is a matter which might appropriately be presented to the Legislature, but not to the court under existing law, because it is *coram non judice*.

The contestor must proceed in the way pointed out by statute. After depositions are taken before the justices, and when the case comes on for trial, if the court finds from such evidence, or from oral testimony taken at trial, that there are any errors in counting the ballots in any precinct or precincts, or if it is of the opinion that there probably are errors, then it may have power to open the particular ballots in a precinct or precincts, and correct all errors therein found.

This, in the opinion of the court, is the power which is conferred on the court in the matter of the contest of election.

The court is without power or jurisdiction to grant the motion and it is therefore overruled.

State, ex rel, v. Vance et al.[Vol. 18 (N.S.)]

**CHARACTER OF THE POSITION OF COUNTY
SUPERINTENDENT OF SCHOOLS.**

Common Pleas Court of Highland County.

STATE OF OHIO, EX REL J. A. B. SROFE, A TAX-PAYER, v. WILBUR
H. VANCE ET AL.*

Decided, November 13, 1914.

*Schools—County Superintendent Under the New Law is a Public Officer
—Injunction—Quo Warranto—Office and Officers.*

A county superintendent of schools, appointed by the county board of education under the act of the General Assembly passed February 5, 1914, is a public officer and as such his eligibility or title to the office can not be brought in question in a suit by a tax-payer to enjoin the payment of his official salary.

John Logan, for the plaintiff.

Wilson & McBride and *Geo. L. Garrett*, contra.

NEWBY, J.

The county board of education of Highland county, created and constituted under the authority of the school code enacted in February, 1914, appointed the defendant, Wilbur H. Vance, to the position of county superintendent of schools and fixed the amount of his salary.

The plaintiff brings this suit to enjoin the payment of the superintendent's salary on the ground, as alleged, that Vance is ineligible to the position for the reason that he does not possess the qualifications prescribed by the statute for the occupant of the position of superintendent.

The case is submitted on general demurrer to the petition.

The authority of the county board of education to appoint a county superintendent and determine his salary is not questioned. The contention of the plaintiff is that the appointment

*Affirmed by the Court of Appeals, March 12, 1915, on the opinion of the lower court.

1915.]

State, ex rel, v. Vance et al.

of Vance was illegal, and consequently that the payment of his official salary is illegal, because Vance is not eligible to the position, in that he does not possess the qualifications prescribed by Section 4744-4 of the General Code, and that therefore his appointment by the county board is a nullity.

It is conceded by counsel that the title of a public officer to his office can not be tried or called in question either directly or indirectly in an injunction proceeding such as this is. And it is undoubtedly the settled law of this state that the proper proceeding and the only one in which a public officer's title to an office can be inquired into is a proceeding in *quo warranto* which must be instituted by and on the relation of the Attorney-General or the prosecuting attorney.

But it is contended by counsel for plaintiff that a county superintendent provided for by the act of the General Assembly, passed February 5th, 1914, is not a public officer within the meaning of that term, but is a mere employee of the board appointing him, and that being such employee, the court can inquire into his eligibility in a suit to enjoin the payment of his salary. So that the question presented to the court on the demurrer to the petition is narrowed down to what is the proper remedy on the facts set out in the petition as to the alleged ineligibility of Vance—injunction or *quo warranto*—and the decision of this question turns upon the question whether the position of county superintendent is a public office within the meaning of the law.

General definitions by the courts and the text-writers as to what is a public office and what constitutes one a public officer are plentiful, but as remarked by counsel during the course of the argument, it is difficult in many cases, and surely it is so in this case, to apply the definitions to the facts of the case.

Our Supreme Court has discussed and decided the question in a number of cases, and I quote from the opinions in some of the leading cases on the subject. In his opinion in the case of *State, ex rel, v. Brennan*, 49 O. S., at page 38, Judge Spear says:

“It is not important to define with exactness all the characteristics of a public office, but it is safely within bounds to say that where, by virtue of law, a person is clothed, not as an in-

cidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office."

And Judge Minshall says in the opinion in *State, ex rel, v. Jennings*, 57 O. S., pages 424 and 425:

"Many efforts have been made to define a public office; and it is only the incumbent of such an office whose rights can be challenged in a proceeding in *quo warranto*. But it is easier to conceive the general requirements of such an office, than to express them with precision in a definition that shall be entirely faultless. It will be found, however, by consulting the cases and the authorities, that the most general distinction of a public office is, that it embraces the performance by the incumbent of a public function delegated to him as a part of the sovereignty of the state. Thus in *Meacham's Offices and Officers*, Section 4, it is said: 'The most important characteristic which distinguishes an office from an employment or contract, is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches, for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer.' So in *High on Extraordinary Legal Remedies*, Section 625, it is said: 'An office, such as to properly come within the legitimate scope of an information in the nature of a *quo warranto*, may be defined as a public position, to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public.' "

Referring to the Brennan case, Judge Minshall said on page 426 of this report:

"The judge in delivering the opinion, did not undertake to give an exhaustive definition of a public office, but did say that 'it is safely within bounds to say that where by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance,

1915.]

State, ex rel, v. Vance et al.

with independent power to control the property of the public, or with functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office.' Here and throughout the opinion, prominence is given to the fact, that a public officer is one who exercises, in an independent capacity, a public function in the interest of the people, by virtue of law, which is only saying in another form, that he exercises a portion of the sovereignty of the people delegated to him by law."

In the case of *State, ex rel, v. Halliday*, 61 O. S., 172, the court say:

"The distinguishing characteristic of a public officer is, that the incumbent, in an independent capacity, is clothed with some part of the sovereignty of the state, to be exercised in the interest of the public as required by law. The office must be of a continuous character as opposed to a temporary employment, though the time be divided into terms to be filled by election or appointment in accordance with the genius of our system of government; and a bond and an oath of office are generally, though not always required for the faithful performance of the duties of the incumbent; and compensation is made either by salary or fees, or both. *Meachem, Officers and Offices*, Section 4; *High on Leg. Rem.*, Section 625; *State v. Brennan*, 49 Ohio St., 33; *State, ex rel, v. Jennings*, 57 Ohio St., 415."

In applying these definitions, the following have been held to be officers: the medical superintendent of a hospital for the insane (*State, ex rel, v. Wilson*, 29 O. S., 347); the president of the city council (*State, ex rel, v. Anderson*, 45 O. S., 196); a stationery storekeeper to be appointed by the clerk of the common pleas court of Hamilton county (*State, ex rel, v. Brennan*, 49 O. S., 38); the office of "county warden" created by Section 409, Revised Statutes (*State, ex rel, v. Halliday*, 1 O. S., 171); a patrolman of the police department whose salary and term of office are fixed by council (*State, ex rel, v. Painesville*, 13 C.C. [N.S.], 577, affirmed 85 O. S., 483); a president of a board of education (*State, ex rel, v. Withrow*, 11 C.C. [N.S.], 569).

And the following have been held not to be public officers: a superintendent of public schools (*State, ex rel, v. Vickers*, 58 O.

S., 730; *Ward v. Board of Education*, 21 C. C., 699); a person employed by a city council to trim lights in its electric light department (*State, ex rel, v. Anderson*, 57 O. S., 429); a fireman employed by the council to perform the usual duties of a fireman (*State, ex rel, v. Jennings*, 57 O. S., 415); a superintendent of a county infirmary (*Palmer v. Zeigler*, 76 O. S., 210).

Upon a study of the various definitions of a public officer and the discussion of the question by the courts and the examples cited by them, we find the infallible test to be this: Is the incumbent of the position under inquiry, in an independent capacity, clothed with some part of the sovereignty of the state, to be exercised in the interest of the people? That is, are his duties prescribed by law without any direction or control over them by the appointing power, and to be exercised in a governmental function in the interest of the public as contradistinguished from those created by contract and subject to control and direction by an employer.

Applying this rule to the case of a county superintendent appointed by the county board under General Code Section 4744, let us consider what are his duties and from what source they are derived. His duties as laid down in the statute are the following:

1. Shall be secretary of the county board; must keep full record of the proceedings, etc. Section 4732, General Code.
2. Shall attend all meetings of the county board and shall be the executive officer of the board with privilege of discussion but not of voting. Section 4744, General Code.
3. Shall co-operate with the different district superintendents in holding teachers' meetings of districts, assembled for the purpose of conferring on the course of study, discipline, school management and other school work and for the promotion of the general good of all the schools in the district. Section 7706-1, General Code.
4. Shall hold monthly meetings with superintendents, and advise with them on matters of school efficiency; visit the schools as often as possible, and with the advice of the district superintendent, shall outline a schedule of school visitation for the

1915.]

State, ex rel, v. Vance et al.

teachers of the county school district. Section 7706-3, General Code (104 O. L., 144).

5. Shall have direct supervision over the training of teachers in any training courses which may be given in any school district and shall personally teach not less than one hundred or more than two hundred periods in any one year. Section 7706-4, General Code (104 O. L., 144).

6. Shall see that all reports required by law are made out and sent to the county auditor and superintendent of instruction and make such other reports as the superintendent of instruction may require. Section 7706-4, General Code (104 O. L., 144).

7. Nominates to the county board district superintendents who must be selected unless a majority vote of the county board should be opposed. Section 4739, General Code.

8. He is made by law clerk of the board of examiners, and a member of the board. Section —, General Code (104 O. L., 144).

He is also charged with other duties with respect to training schools and institutes.

The foregoing are all the duties that are or can be required of a county superintendent and are prescribed by statute, and no power is vested in the county board or elsewhere to add to them. In the discharge of these duties, he is not answerable to the board in any sense nor are they given any direction or control over him whatever. His powers and duties spring from the law alone. He is absolutely and entirely independent of the board and free from its direction or control.

Now this being the nature of the duties enjoined upon Vance by statutory mandate alone, can it be said that the conferring of such duties upon him involves a delegation to him of some of the sovereign functions of government? If it does, he is a public officer, and as said in the beginning, his title to the office is immune from attack by injunction and the demurrer should be sustained. The encouragement of schools and the means of instruction is a fundamental policy of our state government enjoined by the Constitution. The General Assembly is commanded by the Constitution to make such provision by taxation

or otherwise as will secure a thorough and efficient system of education. And it seems unquestionable that whoever may be clothed by law with a separate and independent duty and power to execute and carry into effect this important policy of the state, is, to use the language of the recognized tests of office, invested with a part of the sovereignty of the state and is, in contemplation of law, exercising public functions in the supposed interest of the people. If this conclusion be correct, it follows that the position of county superintendent under the recent act of the Legislature possesses all the indicia necessary to make the position a public office and the incumbent of the position a public officer.

Counsel for the plaintiff contends that the precise question here presented has been determined favorably to him in the cases of *Ward v. Board of Education*, 21 C. C., 699, and *State, ex rel, v. Vickers*, 58 O. S., 730, in both of which cases it was held that a superintendent of schools is not an officer. But these decisions are wholly inapplicable to a case of a county superintendent because of the fact that the duties of the officials mentioned are materially different, and especially because of the further fact that in the present case the duties are derived from the law and are performed independently of any other body or official; while in the cases of superintendents of schools, the superintendents were performing duties prescribed by contract and were answerable to an employer. And besides, as the law stood at the time those decisions were made, the management and control of the schools were vested absolutely in the board of education. The board, and not the superintendent, were responsible for the conduct and control of the school, while under the present law that duty and responsibility are shifted on to the county superintendent. Formerly the superintendent of schools was merely the agent or employee of the board through whom the board discharged their duty to the public to manage and control the schools under their jurisdiction.

I am constrained to hold that under the school law enacted last February the county superintendent therein provided for is a public officer, and hence that the plaintiff has mistaken his remedy. This view of the case renders it unnecessary to pass

1915.]

State, ex rel, v. Vance et al.

upon the contention of counsel for the demurrant that the determination by the county board of the eligibility of Vance is conclusive in the absence of proof of fraud or an abuse of discretion, so I express no opinion on that position of counsel further than to say that I am not impressed with its correctness in a case where the eligibility of the appointee can be legally called in question.

From the standpoint of a citizen interested in the success of the schools it is regrettable that a question exists as to the legal qualification of the one occupying the highly important position of county superintendent of the schools of our county. Now that the question is raised it certainly should be desirable, not only on the part of the occupant of the position personally, but in the interest of the efficiency of the schools as well, to have the question squarely met and the controversy finally and conclusively settled. But there is only one way to reach this result and that is through the form of remedy which the law has pointed out for the settlement of a question of the character here made.

The demurrer to the petition will be sustained and exceptions noted.

ATTEMPTED POCKET PICKING.

Common Pleas Court of Hamilton County.

STATE OF OHIO V. WILLIAM JACKSON.*

Decided, September, 1915.

Criminal Law—Attempt to Pick a Pocket Not Ground for Criminal Prosecution—Where the Attempt Failed.

Where a defendant stealthily removes a watch from another's pocket, which watch is attached to the end of a chain, the chain being fastened to the owner's coat, and the defendant is arrested before he has gotten possession of the watch, he is not guilty of pocket picking. He can not be convicted for attempting to pick pockets because there is no such statutory crime in Ohio.

Simon Ross, Assistant Prosecuting Attorney, for state.

A. Lee Beaty, contra.

MAY, J.

The defendant was indicted on two counts, the first for robbing one Arthur Haley of a gold watch. The second count charged the defendant with assault with intent to commit robbery.

The state proved the following facts:

Haley was stretched out on a park bench; a gold watch attached to a chain was in his coat pocket; the chain was fastened in a button-hole of his coat; the defendant sat down next to Haley and stealthily removed the watch from the pocket, or to use the language of Haley, "just eased the watch out of his pocket," and pulled it over Haley's shoulder with his left hand; the chain remained attached to Haley's coat and as the defendant was putting his right hand in his own pocket he was arrested.

At the conclusion of the state's case, the defendant moved to direct a verdict of acquittal on the first count charging robbery.

*Motion for leave to file a bill of exceptions overruled by the Supreme Court, November 19, 1915, "for the reason that the exceptions to the judgment are not well taken."

1915.]

State v. Jackson.

With the consent of the prosecuting attorney this motion was granted, there being no evidence of violence or putting in fear.

The defendant then moved to direct a verdict of acquittal of the included charge of pocket picking for the reason that the watch was not taken from the person of Haley.

Section 12449 of the General Code reads as follows:

“Whoever, otherwise than by force and violence, or by putting in fear, steals and takes from the person of another anything of value, shall be imprisoned in the penitentiary not less than one year nor more than five years.”

It is well settled that to constitute a larceny from the person “the article must be completely removed from the person and all connection with the person severed.” *McClain on Criminal Law*, Section 575.

So, in picking pockets, the article, as in this case the watch, must have been, if but for a moment, removed from Haley’s person and all connection with Haley severed.

Inasmuch as the watch was never severed from the chain, which at all times was attached to Haley’s coat, the defendant would not be guilty of pocket picking, which is defined by the statute as stealing and taking away from the person of another anything of value.

The authorities in this state and elsewhere are to this effect.

In *Eckels v. State*, 20 Ohio St., 508, at page 513, the Supreme Court says:

“On the other hand, there is a class of cases, where the property taken is not entirely moved from the spot where it was placed by the owner, or where it is attached to some other thing not moved, or to the person of the owner. In this class of cases it has been held that there was no asportation, since there was no complete severance of the property from the possession of the owner. 2 East P. C., 556; 1 Hale P. C., 508.”

And at page 514 the court says:

“It would seem, then, that the test as to the felonious asportation of property is not the fact that it has been taken out of the place of its deposit, but rests in the removal of the entire prop-

erty by the thief, however slight, while it is in his absolute possession."

In the case of *State v. Whitten*, 82 Ohio St., 174, at page 181, the court cites with approval Section 557 of *McClain on Criminal Law* cited above.

In 2 East P. C., 556, Wilkinson's case is cited:

"One had his keys tied to the strings of his purse, in his pocket, which Elizabeth Wilkinson attempted to take from him and was detected with the purse in her hand, but the strings of the purse still hung to the owner's pocket by means of the keys. This was ruled to be no asportation. The purse could not be said to be carried away for it still remained fastened to the place where it was before."

All the leading cases on this question are collected and commented upon by a very exhaustive opinion of Folger, J., in the case of *Harrison v. The People*, 50 N. Y., 518. See also, 2 *Wharton's Criminal Law*, Section 1385; *Stephen's Digest Criminal Law*, Art. 309.

Inasmuch as there is no such crime in this state as an attempt to pick pockets, and as the offense of picking pockets was not completed, the watch not having been taken from Haley's pocket, the defendant's motion for an acquittal of this charge is granted. The state's exceptions are noted.

The defendant's motion for a directed verdict on the second count of assault with intent to rob is overruled.

1915.]

Westwater, Admr., v. Gultner et al.

**CONSTRUCTION OF WILL CONTAINING EXECUTORY DEVICES
PLACING LIMITATIONS ON FUTURE
INTERESTS.**

Common Pleas Court of Franklin County.

JOHN WESTWATER, ADMINISTRATOR DE BONIS NON WITH WILL AN-
NEXED OF JAMES M. WESTWATER, DECEASED, v. ELLA J.
GUITNER ET AL.

Decided, October Term, 1915.

*Wills—Devising Clause Construed in the Light of the Trust Created by
Other Clauses—Quit-Claim Deeds and Written Transfers by Devi-
sees—Ineffectual to Convey the Estates Covered Thereby—Effect
of Such Conveyances when Treated in the Light of Equitable Con-
tracts—Relief Not Barred by Estoppel or Laches.*

Where by the will of a testator he devises to his wife for her use during life his residence, and to his two daughters he bequeaths the rents on another of his three parcels of real estate, of which he died seized; his son David was appointed executor, and he was required by said will to take charge and care of all the property of the testator, including a store consisting of a stock of queensware and other related goods; to pay the taxes and assessments thereon, and collect the rents on the one parcel; to continue the store business as long as it was profitable and until the death of his widow; to pay the rents on the one parcel to the two daughters, thirty dollars a week to his widow, and a salary to himself of \$2,000 a year; to invest and re-invest moneys belonging to the estate, including the profits from the store business, in notes secured by real estate mortgages, improved real estate or in United States bonds; to take an invoice of the stock in the store during the first year, keep careful books of account of the store business and put the invoice and accounting in writing and preserve the same; to use all his time, best skill and endeavor to make the store business profitable and prosperous; at the death of his widow to settle up the estate and make the distribution as thereafter provided, and to that end he was authorized and empowered to sell any or all the real estate either at public or private sale at such price as he deemed sufficient, adequate and proper, to convert all personal goods and chattels into money, and to make, ex-

- ecute and deliver all deeds or other instruments of writing necessary to properly convey any part thereof; explaining and defining the "distribution" which the executor-trustee was to make; by the eighth item of the will the testator gave, devised and bequeathed, after the death of his wife, all his estate, real and personal and mixed, to his six children, their heirs or assigns, in equal shares and portions; and in the event of the death of any of said children before receiving his or her share, leaving no issue of his or her body living, the share of the one so dying should go to the brothers and sisters surviving, their heirs or assigns, in equal shares and portions *per stirpes* and not *per capita*; in the distribution each of the children are to be charged with the advancements made to them by the testator, without interest; before the death of the widow the executor-trustee for himself and other children, made an alleged purchase of the right, title and interest of one of the sons (Robert) who died before the said widow died, leaving children who are defendants to the action taking from him and his wife a quit-claim deed and unacknowledged written transfers of all his right, title and interest in the estate of his father, the consideration therefor being an advancement of \$5,350 made to him by his father in his lifetime, and \$19,955 in money paid out of the estate's assets; and said executor-trustee also, before the death of the said widow, for himself and other children, made an alleged purchase of the right title and interest of another son, (James) who is still living, taking from him a quit-claim deed and an unacknowledged written transfer, the alleged consideration for said deed and transfer being an advancement of \$25,299.70 made to him by his father in his lifetime, and a quit-claim deed from said executor-trustee and the other children, for whom he was acting, releasing to said James their right, title and interest in another parcel of real estate of which the testator died seized, but into possession of which he had placed the said James during his lifetime; before the death of the said widow the said executor-trustee departed this life intestate, and leaving no issue of his body.—*Held:*
- (a). The devising clause in the will though in the apparant form of general grant seemingly showing intent to pass remainder in fee, does not because a clear and unequivocal trust is created in other clauses which discloses a paramount purpose, the interest devised to the children being by way of distribution in the final proceeds from the accumulations and the proceeds of real estate to be sold on death of widow, the distributive interest passing to the children being contingent upon survivorship, the number and names of the beneficiaries being uncertain at the death of the testator, and contingent upon death, survivorship and issue.

1915.]

Westwater, Admr., v. Gultner et al.

- (b). The interests which thus pass by the will to the children, their heirs and survivors, being thus contingent upon death, survivorship, and birth of issue, and governed by *per stirpes* method of distribution, it follows that the interests are wholly contingent and do not become fixed and vested until the death of the widow.
- (c). The will did not fix the names of all the beneficiaries, and the time and condition upon which the devise is made is annexed to the substance of the gift, and the vesting thereof being contingent upon future events and conditions, the devise falls within the class of executory devises, as distinguished from executory interests.
- (d). Executory devises being instituted to support and effectuate the intention of a testator concerning limitations in future interests or estates, which may not take effect as a remainder or other kind of testamentary interest, consistently with law, it follows that such devise must be indestructible by any act of the owner of preceding contingent interest as by alienation, for that would be to defeat the purpose of the will.
- (e). Hence it follows an executory devise can not by contract, deed, or will be transferred by the contingent devisee, so as to defeat the intent and purpose of the will, by depriving those who survive the death of the widow and the issue of any beneficiary who deceases before the happening of the contingent event of their distributive interest.
- (f). That the said quit-claim deeds and written transfers of Robert and James Westwater did not convey and transfer their interest or estates in their father's estate to the grantees therein named;
- (g). That the said purchases made by the said executor-trustee for himself and others from James and Robert, having been made by a trustee with power to sell, can not be enforced in equity against his *cestui que trustent* James and the children of Robert, deceased; and it is immaterial whether the said James and Robert did or did not receive full value for their interests in their father's estate;
- (h). That the children of the said Robert, deceased, are entitled to their father's share of his father's estate minus the advancement made to the said Robert by his said father in his lifetime, and to their father's share of the son David's share of his father's estate;
- (i). That the said son James is entitled to have his share of his father's estate and also his share of the estate of David in his father's estate, the former to be subject to a deduction of advancements made to him by his father;
- (j). That neither the children of Robert nor James are barred of the relief to which they are entitled by either estoppel or laches;
- (k). That the title to the estate of the testator vested in the executor-trustee.

KINKEAD, J.

This action is brought to obtain a construction of a will. James M. Westwater died testate February 26th, 1894. He left Rosean Westwater, his widow, and the following children, James Westwater, Robert Westwater, David Westwater, John Westwater, Carrie M. Hughes (now a widow), and Ella J. Guitner (now a widow). Robert is dead and left a widow and the following children: James H., Robert E., Frederick B., Rogers and Donald, all of whom are of age.

David Westwater was appointed executor and acted as such until his death July 28th, 1912.

The following are the essential portions of the will involved in the controversy:

The homestead and its contents was given to the widow for life.

"Further, I do hereby authorize and empower and direct my executor * * * out of my estate to pay to my said wife the sum of thirty (\$30) per week, payable to her weekly, for and during the term of her natural life, for her maintenance and support.

"Item: I give, devise and bequeath unto my two daughters, Ella Jane Westwater and Carrie Westwater, share and share alike, all the rents and profits of what is known as my Kerr North Graveyard property for and during the natural life of my wife, and the amounts so received by them for their maintenance and support shall not be treated or considered as advancement to them or deducted from their distributive share respectively in my estate on a final settlement thereof.

"Item: I do hereby nominate and appoint my son, David Westwater, to be the executor of this my last will and testament and request that he be not required to give bond or other security for the faithful performance of his duties as such executor. I further request that there be no inventory or appraisal of my estate and effects as required by law in estates of intestates.

"I further desire that the crockery and queensware business carried on and conducted by me at 93 South High street, Columbus, Ohio, shall, after my decease, be carried on and conducted at the same place by my son, David Westwater, for and during the term of the natural life of my said wife.

"My said son David shall devote his entire time, best skill and endeavor to make said business profitable, and in the man-

1915.]

Westwater, Admr., v. Guitner et al.

agement and care of my estate, and for such services and for his services as executor hereunder, he shall receive and be paid out of my estate a salary of two thousand dollars (\$2,000) per year and no more.

“Careful books of account shall be kept and an invoice of stock shall be taken during the first year after my decease, which invoice and accounting of stock shall be put in writing and preserved.

“Should said business, at any time after my decease, and prior to the decease of my wife, become from any cause unprofitable, I hereby clothe my said executor with full power and authority to close out or sell the same, either at public or private sale, for such price as he may deem for the best interest of my estate; however, it is my wish and desire that said business be carried on and conducted as aforesaid. My said executor shall look after my estate, real and personal, and pay all taxes, assessments and insurance on all my property, including the premises hereinabove devised to my wife, Rosean Westwater, for and during her natural life.

“Until the decease of my wife, my said executor shall invest and re-invest the moneys belonging to my estate, including the profits of said business, if any, and in the event of a sale of said business as above provided for, the proceeds of said sale he shall invest and reinvest in loans upon interest with sufficient mortgage security or in U. S. Government bonds or other interest-paying bonds, or in improved real estate in the city of Columbus, Ohio.

“After the death of my said wife my executor shall proceed to settle up my estate and make distribution as hereinafter mentioned, and to that end he is hereby authorized and empowered to sell any or all real estate of which I may die seized either at public or private sale for such price and consideration as he may deem full, adequate and proper, and to convert all my personal goods and chattels into money; also to make, execute and deliver any and all necessary deeds or other instruments of writing necessary to properly convey the same or any thereof.

* * * * *

“Item: After the death of my said wife, Rosean Westwater, I give, devise and bequeath all my estate, real and personal and mixed, of whatsoever name and kind, and wheresoever the same may be laying or situate, unto my children: Robert Westwater, James Westwater, David Westwater, Ella Jane Westwater, Carrie Westwater and John Westwater, their heirs or assigns, in equal shares and portions, share and share alike.

"In the event of the death of any of my children (before receiving his or her share of my estate) leaving no issue of his or her body living, the share of the one so dying shall go to the brothers and sisters surviving their heirs or assigns, in equal shares and portions *per stirpes*, and not *per capita*.

"Should any of my said children be indebted to me at the time of my decease by reason of advancements heretofore made by me to them, or any of them, such indebtedness shall be deducted from their distributive share of my estate without interest, on a final settlement of my estate."

1. THE QUESTIONS TO BE DECIDED.

The petition presents a number of difficult questions of far-reaching importance. The first naturally to be considered is the right of James Westwater and the heirs of Robert Westwater to question, or make objection to, the acts of administration of the executor, or to claim interest in the estate under the will. Both James and Robert Westwater executed alleged quit-claim deeds and assignments of sale of all their interest in the estate of David Westwater, John Westwater, Ella J. Guitner and Carrie M. Hughes. It is therefore contended by the administrator *de bonis non* that they have no interest in the estate, hence no right to object to the course of administration by the executor or by the present administrator.

2. THE FACTS—INSTRUMENTS OF QUIT-CLAIM AND RELEASE.

On July 7, 1900, Robert Westwater and wife executed a quit-claim deed to James, David and John Westwater, and to Ella J. Guitner and Carrie V. Hughes, releasing to them all their right, title and interest in the real estate belonging to the estate, for one dollar and other considerations.

On the same date Robert Westwater executed two paper writings, by the first of which it is stated that for a sum of money entirely satisfactory to him, he sold, conveyed and transferred all his right, title and interest in the estate of his father to his brothers and sisters, and by the second paper writing, for the sum of "one dollar" and for other valuable considerations, including large sums of money heretofore advanced to him," he

1915.]

Westwater, Admr., v. Guitner et al.

sold, assigned and conveyed to his said three brothers and two sisters all his right, title and interest in and to the estate of his father.

The court finds that Robert had been importuning the executor for money from within a year after his father's death; that the executor went to California in the year 1900, telling no one anything specially about his purpose and intent in respect of Robert's interest, excepting to John, to whom he merely stated that Robert had been asking for money and that he was going out to California and end the matter.

The sum of \$5,350 only had previously been advanced to Robert by his father during his lifetime. The report of the executor shows that \$19,955.60 was paid to Robert by the executor, David Westwater, out of the moneys of the estate. The "advancements" to Robert by the executor began the first year after death of the testator, as shown by the accounts.

The court finds that David Westwater, alone, without special authority from other heirs, procured the quit-claim deed and the assignment from Robert, by paying him moneys belonging to the estate, which the executor held in trust for the benefit of the beneficiaries who may survive the widow; that neither James, John, Ella J. Guitner nor Mrs. Hughes took any part in the transaction whatsoever. So far as the evidence discloses, no one but John previously knew anything about it. It does not appear that any of the beneficiaries knew anything about the transaction until after it was completed. The court specially finds that James Westwater neither knew before the assignment was made, nor was he made acquainted with the fact before or at the time he himself executed his quit-claim and assignment to the other beneficiaries.

On August 20, 1902, James Westwater executed a quit-claim deed releasing to David Westwater, John Westwater, Ella J. Guitner and Carrie J. Hughes, all his interest in the real estate of his father. The consideration expressed therein was an advancement of \$25,299.70 made by James M. Westwater, deceased, to James Westwater, and also a deed from David Westwater, individually, David Westwater, as executor of the estate of

James M. Westwater, Ella J. Guitner, Carrie V. Hughes and John Westwater, by which they released, remised and quit-claimed to him their interest in the Oak street property. The executor, as such, had no right or authority to join in such deed of quit-claim.

On the same day James Westwater signed a paper writing reciting for one dollar and other valuable considerations, including large sums of money advanced to him, purporting to sell, assign and convey to David and John Westwater, Ella J. Guitner and Carrie V. Hughes, all his right, title and interest in the estate of his father. It recited, also, that it was "in full settlement of all sums due me or due from me to the said estate."

No personal negotiations concerning the matter were had between James and David; they apparently not being on good terms at the time. David Westwater directed James G. Westwater, son of James Westwater, to tell the latter that they—himself, Brother John, and sisters, would deed to him the "Oak street property" if he would quit-claim to them his interest in the realty of the estate and make the assignment.

The fact that Robert had previously assigned his interest to even James himself, as before stated, was not made known to him, nor was anything concerning that transfer made known to James. Affirmative evidence shows that no detailed information concerning the condition of the estate was made known to either Robert or James, at the time of executing the instruments.

The court finds that the Oak street property had been bought more than twenty-five years before by James M. Westwater, with the avowed purpose that it should be the property of his son James; that James occupied it all these years without paying rent, and that he expended money in making permanent and valuable improvements thereon.

The deed by James to his brothers and sisters was not recorded until April 22, 1910. But the fact of recording it added no value to it.

The account of David Westwater as executor, filed in the probate court, shows "advancements" made to beneficiaries by the testator, and recites certain "advancements" made by the

1915.]

Westwater, Admr., v. Guitner et al.

executor after the decease of James M. Westwater, claiming them to have been made by virtue of an agreement entered into March 19, 1900, by Robert, John, James, and David Westwater, Ella J. Guitner and Carrie M. Hughes authorizing the executor to make advancements and be protected. The "advancements" or payments are specified, and disclose that the \$19,555 paid to Robert was paid out of the estate. It appears that David received \$20,064.42; John received \$19,215.97; Carrie M. Hughes, \$14,631.48; Ella J. Guitner, \$20,130.25, and James the Oak street property, \$6,000. A written agreement was signed by all beneficiaries March 9, 1900, ratifying all advancements previously made to the beneficiaries by the executor.

At the time that Robert and James executed the quit-claim deeds and written assignments of their contingent interest in the estate the widow was living. She did not die until July 15th, 1913.

At the time of such releases, of course, David was living. But he died before his mother did, to-wit, July 28, 1912. He left no issue.

Robert Westwater died April 20, 1912.

The agreement made by all the heirs mentioned in the account of David, as executor, authorizing him to make advancements, was made to ratify advancements previously made without authority. This agreement to make advancements was made March 19, 1900, and the settlement with Robert was made July 7, 1900, while the one with James was made August 20, 1902.

3. GENERAL QUESTIONS PRESENTED.

The foregoing statement of facts relate solely to the formal documents by means of which it is claimed that Robert and James relinquished, transferred or assigned their interests in the estate, under the special circumstances or representations accompanying the same.

Whether the documents were legally sufficient to release or transfer their interests, depends not alone upon the mere instruments themselves, but as well upon the facts, circumstances and the law. The legal effect of the quit-claim deeds and assign-

ments can not be determined without considering first some other questions, viz.:

1. Did they have vested interests which could be conveyed or released by them?

2. If they did, did the fact that the executor purchased the interests out of moneys belonging to the estate for his own benefit, as well as for those for whom he was acting, under the circumstances, render the transaction voidable?

A. To decide this the legal duty of the executor and his performance thereof are to be considered. Did the executor make sufficient, full, legal disclosure of all facts essential to enable the parties to act? Are the beneficiaries, or the representatives thereof, estopped from denying the legal consequence in equity of the instruments by them executed?

4. CONSTRUCTION OF THE WILL.

The intent and purpose of the will is clear that the estate was to be kept intact until the widow deceased. The business was to be carried on until that period, unless it proved unprofitable. The moneys of the estate and profits of the business, or proceeds, in event of its sale, were to be invested in loans with sufficient mortgage, or in U. S. Government bonds, or other interest-paying bonds, or in improved real estate. The estate was to thus accumulate and remain *in solido* until the death of the widow. The whole estate was to be held in trust for the purposes specified by the will.

The estate was to be allowed to accumulate, and was to be held in trust. It was to be invested as directed, and not to be advanced to the beneficiaries.

A portion of the money accumulating was to be paid to the widow—\$30 per week—and to pay taxes, assessments and insurance on his real estate. The income of the "Kerr North Graveyard property" was to go to the two daughters during the life of the widow, which was not to be treated as an advancement.

The real estate, and all accumulations and investments were to be held in trust by the executor until the death of the widow. When that occurred the executor was authorized to sell any or all real estate of which the deceased was seized, "either at public

1915.]

Westwater, Admr., v. Gultner et al.

or private sale for such price and consideration as he may deem full, adequate and proper, and to convert all * * * personal goods and chattels into money." The executor was authorized to make, execute and deliver any and all necessary deeds or other instruments of writing necessary to properly convey the same," etc.

Then, and not till then, were the proceeds of his property to be distributed to the beneficiaries or heirs named. At that time, as provided, the will required that the executor "shall proceed to settle up my estate and *make the distribution as hereinafter mentioned.*"

The clause referred to in the will providing how the money accumulating from the business and from the sale of the real estate was to be *distributed*, is as follows:

"After the death of my said wife, Rosean Westwater, I give, devise and bequeath all my estate, real and personal and mixed, of whatsoever name and kind, and wheresoever the same may be lying or situate, unto my children, Robert Westwater, James Westwater, David Westwater, Ella Jane Westwater, Carrie Westwater, and John Westwater, their heirs or assigns, in equal shares and portions, share and share alike. In the event of the death of any of my children (before receiving his or her share of my estate) leaving no issue of his or her body living, the share of the one so dying shall go to the brothers and sisters surviving, their heirs or assigns, in equal shares and portions *per stirpes*, and not *per capita*."

It is to be observed that the foregoing clause is in the technical form of a grant, as if it was in disposal of an estate in lands, instead of in the proceeds thereof. The intent of the testator, however, is to be gathered from the whole will; from the general plan thereof. The above clause, taken with the grant of the life interest to the widow, is in the form of a general grant, and seemingly shows an intent, to pass a remainder in fee to the heirs named, their assigns or survivors, after the life estate is ended.

But this is not so, because there is a clear and unequivocal trust provided for in other portions of the will which is the paramount purpose, so far as relates to the children of the tes-

tator. The will provides—in the general plan thereof—that the executor shall take and hold the real estate for the uses and purposes specified. The homestead is to be held for the use and benefit of the widow. The executor is to continue the business for her benefit, to pay therefrom sufficient money for her living and the upkeep of the homestead. The graveyard property is to be held in trust by the executor for the sole use and benefit of the daughters, the income therefrom to be paid to them for support, but not as advancements.

Upon the death of the widow, the executor is required to sell all the real estate, as well as the business, and to distribute all moneys derived therefrom, as well as from the accumulated income and investments, in equal shares and portions, share and share alike to the children named. And if any of the children die without issue, before receiving his share, it shall be distributed to the brothers and sisters surviving and their heirs in equal shares and portions *per stirpes*, and not *per capita*.

We have here language in the apparent form of a pure devise of the fee of realty, specifically parceling out the shares with descriptive terms appropriate to such devises. That is, the separate clause last quoted, considered alone, looking to the technical language, "give, devise and bequeath all my estate, real, personal and mixed, their heirs or assigns, in equal shares and portions, share and share alike," etc., indicates a purpose to bequeath the personalty, and to devise the remainder in fee.

The latter part of the clause, providing for the contingency of the death of one beneficiary without issue living, the share shall go to the brothers and sisters in equal portions *per stirpes*, and not *per capita*, is technical in its import. That is, taken with the whole of the clause, the clear intent is, that the personalty, and the fee of real estate of the one so dying, shall pass to the remainder *per stirpes*, to those living and to the representatives of any who may be deceased. The technical meaning of such language is to pass a vested interest in the fee (according to the fiction of law), as to vesting the remainder in fee on death of testator, as though the actual intent and purpose was to vest the physical estate in the realty.

1915.]

Westwater, Admr., v. Gultner et al.

But it can not be presumed that the technical words standing alone in this clause were used in their technical sense. They can not be given their full, definite, legal signification as if applied to the fee of the land, because there is a clear intention to the contrary apparent from the context. (See 40 Cyc., 1398.) The relation and effect of this clause, succeeding as it does the preceding paramount provisions of the trust created, which, taken with the whole will, discloses an intent on the part of the testator that the fee of the real estate was never intended to pass to and become vested in the beneficiaries. Of course, the provision, so far as it relates to the personalty, is consistent with the whole will. But not so with the provision relating to the real estate.

In this connection, note the language:

“death of any of my children (before receiving his or her share of my estate) leaving no issue,” etc.

This shows the non-technical use of an apparent *alleged* “devise” of real estate, because previous parts of the will show that the heirs named were only to receive the proceeds of the sale of the real estate, together with the personalty. The will is so framed that the heirs are not entitled to receive their share until after the death of the widow. Nothing becomes vested in them until that period. So it is impossible from the language of the whole will for the interest in the money and personal securities to have been received until after the death of the widow. So the clause is to be so construed as not to intend that there was to be a technical vesting of a fee, because the testator is presumed to have intended, if any one of the heirs died before the widow’s death, that in such contingency the share he intended to give him, if living, would go to the others or their legal representatives *per stirpes*.

Under such construction, David and Robert having died before the widow, by giving effect to the intent of the testator, and by the operation of his will, upon the death of either of them, by force of the non-technical language of the whole will, the interest in the existing personalty and in the expectant proceeds

of the real estate was to be distributed according to the will, and at once the same becomes subject to the bequests of the testator, because the contingency for rendering the provision inoperative as to those who die before the widow, had happened.

If the heir died after the real estate had been sold and the proceeds were in the hands of the executor, but not yet distributed, the funds would become impressed with the provisions of the will, and would, no doubt, become vested, by analogy, to the rule that obtains where an administrator or executor has sold real estate and holds the proceeds.

The language, "*before receiving his or her share of my estate*," is not technical, and not entirely clear. It can not be considered literally, because it was evidently not meant "before actually getting or receiving the physical possession of his share." It is clear, from the whole will, that it was intended to mean, if one heir died before the death of the widow, the interest would pass unto the other heirs *per stirpes*, when the widow did de cease. The death of the widow is the contingency which gives life to the devise, the executory devise and interest.

The general rules of construction applied in the foregoing are

"Where a testator uses in his will technical words or terms, or words having a definite legal signification, he will be presumed to have used them in that sense, and it will be so construed, unless a clear intention to the contrary is apparent from the context. 40 Cyc., 1398.

"The relation and effect of succeeding clauses in a will depends upon the intention of the testator as gathered from the whole will, and the local order of the will may be disregarded and its clauses and provisions transposed, if thereby every part can be rendered consistent and effective. 40 Cyc., 1413.

"Isolated statements or separate clauses and provisions should not be considered alone," etc. *Id.*

"The relative position of the clauses or provisions may be disregarded." *Id.*

The provision as to survivorship fixes the time thereof as at the death of any child before receiving his or her share.

In *Renner v. Williams*, 71 O. S., 340, 357, it is said:

1915.]

Westwater, Admr., v. Guitner et al.

"It seems conclusively to follow that when a testator provides merely that in case of death of one or more of the devisees or legatees, the survivor or survivors shall take the provision made in the will, he refers to the survivorship which shall exist at the time a devise of real estate may vest or when a legacy may be payable."

Or it refers to the termination of a particular interest, such as at the time of the death of a devisee of legatee. See 40 Cyc., 1512.

The devise or legacy to David or Robert, was contingent upon their living until it became vested by the death of the widow.

A devise to two children of a testator, with provision that "should either die without heirs capable of inheriting, all such one's share and legacies under this will shall inure to the survivor," vests in each an estate in fee determinable upon the contingency of death without children; and, upon that contingency the estate of the deceased child passes to the other by way of executory devise. *Durfee v. MacNeil*, 58 O. S., 238.

But the provision in the Westwater will is not a devise of the fee. It is a devise of the proceeds of the sale of real estate, after the termination of a life estate, and, as claimed by counsel for defendants, it can be nothing more than an executory devise, or interest.

6. THE DEVISE AND BEQUEST IS AN "EXECUTORY DEVISE OR INTEREST" CLEARLY DISTINGUISHED FROM A "POSSIBILITY COUPLED WITH AN INTEREST" AND "CONTINGENT REMAINDER."

An executory devise strictly is such a limitation of a future estate or interest in lands, or personalty, as the law admits in the case of a will, though contrary to the rules of limitations in conveyances at common law. *Thompson v. Hoop*, 6 O. S., 481, 486.

Executory interests, however created, are such as take effect at some time in the future, measuring from the time when the document takes effect. An executory devise is a devise of an estate or interest which shall not vest at the time of the death of the deviser, *i. e.*, when the will becomes operative. *McArthur v. Scott*, 113 U. S., 359.

An executory devise is one to persons whose existence is uncertain, as by a limitation of an interest over by survivorship, as a limitation over to persons who survive a certain event when the same is to vest. 40 Cyc., 1646; *Lapham v. Martin*, 33 O. S., 99; *Rutledge v. Fishburne*, 66 S. C., 155, 97 Am. St., 756. In *Lapham v. Martin*, *supra*, the bequest was to M. L., provided if she died leaving no child of her own, the money shall be equally divided between the testator's children; it was held to be an *executory devise, because the limitation over was dependent on a future uncertain event, her dying leaving no child.*

"An executory devise is a limitation by will of future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyances at law." 4 Kent Com., 264.

"There were two kinds of executory devises relative to real estate, and a third sort relative to personal estate. (1) Where the devisor parts with his whole estate, but, *upon some contingency* qualifies the disposition of it, and limits an estate on that contingency. * * * (2) Where the testator gives a future interest to arise upon a contingency, but does not part with the fee in the meantime. * * * (3) At common law, * * * if there was an executory bequest of personal property, as of a term for years to A for life, and after his death B the ulterior limitation was void, and the whole property vested in A." 4 Kent, 268-9.

"If the 'limitation' of an estate or interest be over to take effect on failure of issue *living at the time of the death* of the person named as the first taker, then the contingency determines at his death, and no rule of (common) law is broken, and the executory devise is sustained." *Id.*, p. 274.

The limitation in the Westwater will is that in the event that any of his children die before the receipt of his or her share, leaving no issue of his or her body, the share of such ones who may die before the death of the widow, the time fixed by the will for distribution, then the share of the one so dying without issue shall go to the brothers and sisters surviving their heirs or assigns *per stirpes*.

Two contingencies are presented by the will, viz: one, that of dying without issue before the widow and before distribution, and (2) another, that of death before distribution, but leaving

1915.]

Westwater, Admr., v. Gultner et al.

issue. That is, in case of death of a beneficiary *without* issue, and of death of another beneficiary leaving issue, before death of the widow, and before the time fixed for distribution, in either event the share of each and both of such beneficiaries passes and becomes vested upon death of the widow, *per stirpes* to the children of the testator surviving and their heirs. This means that the share of Robert will vest in his children and the share of David will vest in the surviving children of the testator, and *per stirpes* in the children of Robert.

It has been stated that no question can arise in the course of legal inquiry, less referable to fixed and certain rules and principles than whether the words of a devise or bequest constitute a vested or contingent interest. Such conception, however, is due to the ever-varying language of testamentary instruments as affecting intention. The leading inquiry upon which the question whether a devise be vested or contingent, is whether the gift is immediate, and the time of payment or of enjoyment only postponed, or is *future and contingent*, depending upon surviving some other person, and death *with* or *without* issue, and the number of issue left.

The names of all the beneficiaries who may take under the Westwater will were not fixed and determinable by the testator at the execution of his will, nor were they ascertainable at any time according to the natural course of events until after the death of the widow.

The settled rule applicable to such provision as is contained in the will under consideration is, that where the futurity is annexed to the substance of the devise or bequest, the vesting is suspended; it is only when the gift is absolute, and the time of payment only is postponed, that the same may vest upon death of the testator.

When the time and condition upon which the devise is made, is annexed to the substance of the gift by way of conditional precedent, and the vesting or not in certain persons is made dependent upon events or conditions which may never happen or arise (as in Westwater will), the same is then subject to a condition precedent, and is contingent. This is the settled doctrine.

See Monographic note (and cases) 10 Am. St. Rep., 470-479; *Everitt v. Id.*, 29 N. Y., 39; *Scofield v. Olcott*, 120 Ill., 362; *Colt v. Hubbard*, 33 Conn., 281; *McClure's Appeal*, 72 Pa. St., 414; *Scott v. West*, 63 Wis., 529.

It is entirely clear that none of the Westwater beneficiaries had a vested interest but that the devise was contingent on events that, by the *law of the will*, would pass the vested interest to others not named, and who were to share equally (*per stirpes*) with those surviving; while those surviving would have additional shares added to their own.

These features unmistakably show that the devise and bequests are not pure legacies; because they are not fixed and definite; that they are not remainders because not an estate in the land itself, but are by way of executory devise.

An executory devise is clearly distinguished from both a contingent remainder and what is frequently classed as a "possibility coupled with an interest." In a contingent remainder the fee becomes vested on the death of a testator. In the case of a "possibility coupled with an interest," the beneficiaries each and all of them are capable of *definite ascertainment* and of being fixed by the testator at the time of making his devise. Hence in each of such cases, the essential interests of each of such beneficiaries being fixed and definite, but contingent upon a certain event or happening, it is therefore possible for any or all of them to make agreements of release between themselves which may be binding and enforceable in equity. They have a fixed and definite interest, which may on their death pass to other beneficiaries whose status under the devise is equally fixed and definite. There is then no possibility of other and new beneficial interests intervening to share the devise upon death of one of them. If the Westwater will had provided that on the death of one beneficiary his share should go to the survivor or survivors, and not to their heirs, not *per stirpes*, then the testator would by his will have fixed and determined the beneficiaries without uncertainty. In such case the interest of each, before the death of the widow, would have been classed as a "possibility coupled with an interest," the interest not then being contingent except

1915.]

Westwater, Admr., v. Guitner et al.

upon the certainty of death, according to which all reckonings are made.

To summarize, then, it may be stated that: a contingent executory devise, or bequest, when the persons who are to take upon the happening of the contingency are definitely ascertained and fixed by the testator, is then to be classed as a possibility coupled with an interest. That is, the interest of the class of persons who are to take on the happening of the contingency is definitely fixed by the testator. That interest coupled with the possibility is such that it may be transferred and assigned or released in equity, at least between the beneficiaries themselves.

But where each and all the persons who, under all possible contingencies may not be ascertained, fixed and determined by the testator himself at the time of making his testamentary disposition, being made dependent upon death and birth, then such possibility is not to be classed with those which are considered as being coupled with an interest, and capable of full release and extinguishment as between themselves in equity.

It must be that class of executory devises, or possibilities coupled with an interest, where each and all of the interests of the beneficiaries are capable of being definitely ascertained and fixed by the testator, and which are so fixed by him, by devise, that may fully release quitclaim or devise, to each other.

Executory devises were instituted in order to support and effectuate the intention of a testator concerning limitations in future estates, which could not take effect as a remainder or other kind of testamentary interest, consistently with law. A preceding estate or interest is not essential or material. *Lessee v. Hoop*, 6 O. S., 481, 485-6; 28 Am. St., 660.

Its essential rule is that an executory devise can not be created if the first estate is such that it can be alienated; and *such devise is indestructible by any act of the owner of the preceding estate* (*Williams v. Elliott*, 246 Ill., 548; 136 Am. St., 254, 256). There can be no executory devise if the estate devised to the first devisee is such that he can, by virtue of his ownership, alienate the estate in fee simple. *Id.*, 4 Kent Com., 10; *Smith v. Kimball*, 153 Ill., 1029.

While this rule has reference to the interest of the widow and to the beneficial use to the daughters, in the Westwater will, still the principle is suggestive as touching the statutes of the preceding contingent interest of the children of the testator. There is an executory devise over to his grandchildren, if one of his heirs died before the widow. To permit any one or all of his children to alienate, assign or release their contingent interests to each other would be destructible of the executory devise to his grandchildren.

Indeed the interest of the children of the testator is precisely analogous to that of heirs by descent, but without even as much certainty; it is a mere naked possibility.

“Executory devises are applicable to testamentary dispositions of personal property, although in such cases the limitation is more properly termed as executory bequest; and under the common law rule against creation of remainders in personal property, any limitation over of a future interest therein would necessarily operate only as an executory devise. An executory devise or bequest of personal property may be created by limitation over upon the first devisee dying without issue.” 40 Cyc., 1648; *Glover v. Condell*, 163 Ill., 566; 33 L. R. A., 360.

An estate is contingent while the person or persons to whom or the event upon which it is limited to take effect is uncertain. 40 Cyc., 1649; *Wadsworth v. Murray*, 29 N. Y. App. Div., 191; 161 N. Y., 274; 76 Am. St., 265.

“If the time or event is annexed to the payment of the legacy, it is vested; if to the substance or gift of the legacy, it is contingent. One of the tests, although not exclusive, is the right of alienation. If the beneficiary is clothed with a present right of alienation, the estate is vested; otherwise not.” 40 Cyc., 1650.

Where the direction of the will is to pay or distribute in the future, the beneficial interests do not vest until the time for distribution, when the reasons for such postponement are personal to any of the beneficiaries. Such a devise or bequest is clearly contingent when it is deferred according to the general plan of the trust or beneficial use of the devise and bequest is specially made for the direct and personal benefit of certain or all bene-

1915.]

Westwater, Admr., v. Gultner et al.

ficiaries, as is the case under the Westwater will. See 40 Cyc., 1656-57 and cases. See *Engles Estate*, 166 Pa. St., 280, where there was similar provision to the Westwater will.

It seems clearly to be demonstrated that the provision to the beneficiaries under the will of deceased Westwater was by executory devise and bequest. When this point is decided it must follow that the interests were contingent and not vested; this must follow because no legal sale, assignment or alienation can be made by the beneficiaries, because for them to have such power would be to destroy the devise. This statement has no reference to the enforcement of an equitable contract of estoppel against those who survive the death of the widow. See *Gales v. Seibert*, 80 Am. St. Rep., 265, on p. 629; 157 Mo., 254.

7. MAY AN EXECUTORY DEVISE OR INTEREST BE ASSIGNED
OR RELEASED.

Having determined that the beneficiaries under the Westwater will take a contingent executory devise and interest the question next to be considered and decided is whether such beneficiaries may in equity assign or release their beneficial interest, contingent upon their survival of the widow, to each other before the happening of the contingency which operates to vest the interest in them. It is to be conceded that they may not make legal conveyance of the real estate or of the personality.

The clear distinction between contingent remainders, executory devise, interests and possibilities coupled with an interest, must be kept in mind in order to properly apply the rules, as well as to distinguish the cases and the doctrine which they enunciate.

Where a will creates a contingent remainder, by fiction of law the fee becomes vested in the remainderman subject to the limitations of the devise. But in case of an executory devise or interest no fee becomes vested in the beneficiary on the death of the testator.

The common law, it is said, did not sanction or recognize the right to grant or assign a possibility or a right of title. Con-

tingent remainders and executory interests were not assignable. But later by the English Statute of Wills they could be devised, and by common law they could be released by an instrument operating by way of estoppel. Contracts and assurances relating to them for a valuable consideration may generally be enforced in equity. Such is the *dictum* contained in *Bartholomew v. Muzzy*, 61 Conn., 206; 29 Am. St., 206 (citing *Chellis on Real Property*, 52; *Smith v. Pendell*, 19 Conn., 112; 48 Am. Dec., 146). The conveyance involved, however had to do with a contingent remainder, not an executory devise.

The statement is frequently made that in this country all contingent and executory interests, such as contingent remainders and executory devises to persons who are certain, and other possibilities coupled with an interest, are assignable, at least in equity.

See *Monographic Note*, 56 Am. St., 339-361 on pp. 360-1, citing *Nimmo v. Davis*, 7 Tex., 26; *Fortesque v. Satterwaite*, 1 Ired, 560; *Bodenhamer v. Welch*, 89 N. C., 78; *Miller v. Emans*, 19 N. Y., 384; *Watson v. Smith*, 110 N. C., 6; 28 Am. St., 665; *Brown v. Dail*, 117 N. C., 41; *Wheelen v. Phillips*, 151 Pa. St., 312; *Smith v. Pendell*, 19 Conn., 107; 48 Am. Dec., 146, and other cases. See *Pomeroy's Eq. Jur.*, Section 1287, *et seq.*

The above statement found in the discussions of judicial opinion on the general subject of contingent interests is misleading, because it includes therein executory devises and interests as if the same rule applied to contingent remainders, possibilities coupled with an interest, and executory devises. Careful examination of the cases bearing on these questions clearly show the points of distinction between the rules and decisions applicable to contingent remainders, executory devises or interests, and possibilities coupled with an interest.

From an early period the rule applicable to *contingent remainders* has been that as expressed in *Jeffers v. Lampson*, 10 O. S., 102, 108, viz:

"The law has always allowed *releases* of rights by way of contingent remainder as between the terre-tenants, those who take the same rights, as remainder in fee."

1915.]

Westwater, Admr., v. Gultner et al.

The rule of English law found in the early case of *Arthur v. Rokenham*, 11 Mod., 152, as applicable to a "possible right" only, was thus stated:

"Yet the law has allowed releases of rights, which are in the nature only of possibilities, that a man may release to him who has the *possession of a possible right only*, though it does not allow him to transfer or convey away to a *stranger* such a right; and that is why the law allows a man to release an *executory interest* in a term which he has devised to him, and is in the nature of a possibility; but yet he can not assign it away to a third person, though he may, as I said before, release this right to the possessor of the land by way of extinguishment."

An executory devise was not involved in that case.

The court in *Jeffers v. Lampson*, while conceding that William Jeffers at the time he released to Henry had merely a *contingent remainder*, and though not a *terre-tenant*, or the *actual possessor* of the land, still the release by William to Henry though not within the ancient rule as stated, was nevertheless clearly within the reason thereof.

In each of the two brothers, Henry and William, the court held "*there was a present interest, a vested remainder*"; that Henry who purchased of William "*had a large and valuable vested interest in it, and the release operated by way of 'relinquishment' and tended to 'repose and quiet.'*" It was held that though Henry, to whom William had quit-claimed his contingent interest in the fee, did not survive the widow—the life tenant—while William did nevertheless William could not be permitted to assert his claim to the fee under the will against the assigns of Henry, because he had quit-claimed his contingent fee to him, and it was entirely competent for him to do so in law.

The grounds of this decision seem to be: first, that the fee was vested in the devisees; and secondly, that such release of a vested interest may be made between persons having the same vested fee. It is to be noted that the court declined to give approval to the application of such rule to conveyances to a *stranger* as had been done in the cases of *Pelletrean v. Jackson*, 11 Wend., 110; *Jackson v. Varick*, 13 Wend., 178. These two deci-

sions were subsequently overruled in *Miller v. Emmans*, 19 N. Y., 384 (1859), where the same doctrine of *Jeffers v. Lampson* was applied, it being held that the future contingent interest of the devisees was not a mere naked possibility, but passed by release from some of them to the others. The court stated:

"It seems that any and every contingent right, however uncertain, may be released to a part already seized of a *present estate* in the premises in possession, and that the mere remoteness of the contingency affords no objection to its being so released, provided the right can be said to have any present existence." The four heirs had a vested fee subject to be lost on the death of any of them.

A monographic note in 56 Am. St. Rep., 339-361, is the most complete discussion found, and it cites many authorities which appear to apply to the question under consideration. It contains by far the best discussion and furnishes the most complete collection of decisions that has been found bearing on the topic of "Contingent Interests." The cases cited have all been examined, and some reference and comment is made respecting them. The following is quoted from the Notes:

"Courts of equity are in the habit of giving effect to assignments of contingent interests and expectancies, whether they are in real or personal property, 'not, indeed, as a present positive transfer, operative in *presenti*, for that can only be done of a thing in *esse*, but as a present contract, to take effect and attach as soon as the thing comes in *esse*.'" *Bibend v. Ins. Co.*, 30 Cal., 79, 86; *Union Mfg. Co. v. Loundsbury*, 41 N. Y., 363, 374; *Field v. Mayor*, 6 N. Y., 179; 57 Am. Dec., 435 (assignment of all bills that might become due for job printing); *Collins Appeal*, 107 Pa. St., 590; 52 Am. Rep., 479 (assignment, pledging all interest in limited partnership); *East Lewisburg, etc., Mfg. Co. v. Marsh*, 91 Pa. St., 96; *Ridgeway v. Underwood*, 67 Ill., 419; *Crum v. Sawyer*, 132 Ill., 443 (contract by husband to release his contingent interest in his wife's lands).

The parenthetical explanations of the cases cited show the want of application to the present will. *Bolton v. Bank*, 50 O. S., 290, is urged by plaintiff as an authority. There was a devise of real estate in trust to collect rents and pay a definite sum

1915.]

Westwater, Admr., v. Gultner et al.

annually to the widow during life, and to divide the residue equally among the children or their heirs; and at the death of the widow to convey an equal part of the lands to each of his children or their heirs. This was held to vest an equitable estate in each one of the children. The *per curiam* of the court, without comment or reasoning, considered this as vesting an equitable estate at the death of the testator. The case is not applicable because it deals exclusively with the fee.

The case of *Jeffers v. Lampson*, 10 O. S., 102, is not in point because it has to do with a vested remainder subject to be defeated. As stated by the court:

“Here, then, was a vested remainder in William and Henry in those premises, in equal and undivided moieties in common, subject, however, to be divested on the happening of a contingency. *In each there was a present interest*, a vested remainder; and in each there was a possibility of a survivorship to the whole premises, depending on a contingency which did afterwards actually happen.”

A careful examination of the decisions on the subject of *contingent interests* discloses that they have universally dealt with contingent remainders, or with possibilities coupled with an interest. In the general discussion of the rule the opinions and texts are usually couched in language which apparently embrace and apply to “executory devises or interests,” possibilities coupled with an interest, and contingent remainders, as if one general formula applied to each. In the valuable Monographic Note, 56 Am. St., 339, there seems to be not more than two decisions bearing directly on executory devises or interest.

In *Nimms v. Davis*, 7 Texas, 26 (1851), there was a disposition of negroes. It was stated that:

“All contingent and executory interests are assignable in equity, and will be enforced if made for a valuable consideration. * * * All executory uses and possibilities, coupled with an interest, where the person to take is certain, are transmissible by descent, and divisible and assignable. It is incumbent on the party dealing with the heirs to show that the dealing is fair and for an adequate consideration.”

This is a correct statement of law, but not applicable to the executory interest in the will under consideration.

In *Wheelen v. Phillips*, 151 Pa. St., 312, a legatee was entitled to a legacy of \$4,666.66, contingent upon his surviving his mother. During the lifetime of his mother, who was then 76 years of age, the legatee being in financial straits, sold his interest in the legacy for \$1,000 to a person who stood in no trust relation to him. If he died before his mother, then nothing would pass to the assignee.

Charles L. Phillips, the legatee, made assignment of the legacy to Jno. M. Doyle, who assigned it to W. E. Dobbins. Subsequently Phillips became vested with the devise, by surviving his mother, and entitled to the legacy of \$4,666.66 and also to a distributive share of a legacy to his sister contingent upon her surviving her mother, which she did not do.

The clause in the will was:

To her sons, Henry, Edwin and Charles L. and the issue of any of them that may be deceased, then (at death of Mrs. Phillips) living, each the sum of \$4,666.66, such issue of deceased daughters or sons taking, however, only the sum that would have been payable to their parents living.

If Charles L. had died before his mother, his share would have gone to his heirs. But having survived his mother the legacy became vested in him. He had sold it to a stranger whose right to hold it in equity was upheld.

This decision is the only one found which appears to involve an executory interest. The will contained a gift of a legacy, which was contingent on survivorship. The facts in the case disclose that the beneficiary took a beneficial interest of another legatee, his sister, by reason of her death, and under the clause of survivorship. He lost both on account of his assignment, and because he survived the contingency by reason whereof the legacy became vested. But having made a sale and transfer, he was held bound to it in equity, in the absence of inequitable considerations.

The conclusion after careful reading and consideration of the decisions directly or indirectly bearing on the question must be,

1915.]

Westwater, Admr., v. Guitner et al.

that the assignability of an executory devise or interest, such as is involved in this case, is not to be governed by the same rule that is applicable to a contingent remainder or to a possibility coupled with an interest. The point of distinction is well illustrated by the decision in *Jeffers v. Lampson, supra*. In that case the quit-claim by one contingent remainderman to another was upheld as against the one who had transferred it to his brother, although the latter, who had transferred the whole of the contingent remainder to a stranger, did not survive the life estate, while the assignor did survive the life tenant. By the terms of the will the final estate would have become vested in the assignor, and not in the assignee. But because the assignee was possessed of the fee, it was considered that as he had a large and valuable vested interest in the fee, it tended to "repose and quiet" to the persons who took the estate from the transferee with covenants of warranty, for a valuable consideration, and other subsequent grantees on the faith of the original release, who had also acquired the interest of the life estate by proper conveyance.

But in an executory devise or interest such as that released by Robert Westwater there was no vested interest which he could convey or release. As Robert did not survive the holder of the life interest, or Rosean Westwater, the surviving brothers and sisters have acquired vested interests in the devise, but they can not assert an equitable right against the legal representatives of Robert. Robert had no vested interest at the time of his quit-claim and assignment, analogous to that of a vested fee of a contingent remainder, which he could release to other beneficiaries.

The soundness of this conclusion may well be illustrated by the position of James, who survived the widow, and whose interest vested subject to any equities that may be asserted against him. No estate in fee simple became vested in James, John or the two sisters, because no such devise is made in the will. The quit-claim deeds executed by each of them are not effective as deeds of conveyance, because none of them became vested with a fee. But such instruments, if fairly entered into, without constructive fraud, and for adequate consideration, may be asserted

by each against the other *in equity or by way of estoppel*, for the purpose of adjusting the equitable interests which each of them may have in the estate. This rule may be applied as between the surviving children of the testator, but not to the heirs of any not surviving.

The quit-claim deeds can not operate as such, because by the will no estate in the land itself was devised. The will directed the land to be sold, and the proceeds thereof, together with the proceeds from sale of the store or business, as well as the accumulated profits arising therefrom, and the investments by the executor, be distributed equally between all the beneficiaries *per stirpes*.

It is impossible to convey a clear title to the Westwater land by reason of the provisions of the will, the condition of the estate, and because of the death of Robert before the death of his mother, except by a sale of the real estate as directed by the will. The land must thus be sold and conveyed to confer a good title, or else all the living beneficiaries—including the heirs of Robert—must make a deed for the same, relinquishing all their right, title or interest under the will and the law.

A purchaser can not obtain a clear title in any other way. It would then have to be made to appear that all the conditions of the will had been carried out to the satisfaction of all beneficiaries.

It must, therefore, be concluded that the deeds of quit-claim are invalid as legal conveyances; and that the assignment and release by Robert is void; that the interests of Robert and David have become vested in the survivors and the legal representatives of Robert.

The law of a will is as mandatory as statutes of descent. It can not be departed from except as the parties may legally make an agreement among themselves, which will bind them in equity. But only the beneficiaries can bind themselves, according to the interest they have. Robert received from the executor the sum of \$19,955.60, which did not belong to him by the terms of the will, and which the executor had no right to pay to him. If Robert were living, a court of equity might consider his conduct and agreements, together with that of the other beneficiaries, and

1915.]

Westwater, Admr., v. Gultner et al.

hold him and them to the consequences thereof. This may be done as between those living, but not as to heirs of those deceased. The facts of the adjudicated cases have been examined to ascertain whether any of them dealt with conditions such as we have here. But the reported cases have not been between the dead and the living where the children of the dead are to take *per stirpes*.

It would seem from the conduct of the executor, his accounts and his administration, that he did not regard the rights of all who may become beneficiaries. He had no power or right to make "advancements;" he could not have understood the will when he made the advancements. He wrongfully paid out much money of the estate to different beneficiaries before he thought of getting protection for himself or for the beneficiaries. He had not counted on the effects of death. He thought he could will his own interest. The agreement of March 30, 1900, was executed to bind each of the beneficiaries to all of such payments. Previous to that date no general agreement had been made, binding each and all to such plan of division. It is specially significant that the agreement recites that these "advancements" were made by the personal and individual solicitation, and not because the executor desired to do so, or for any benefit of his own, and still he had taken out of the funds an "advancement" for himself of that sum, \$20,064.42. Special mention was made of the fact that each and all were fully aware of the provisions of the will relative to the distribution and settlement of the estate between themselves after the mother's death. No doubt it was perceived that there was danger in the plan of division without authority.

If Robert and David were now living, each and all the beneficiaries could in equity be held to their agreement, just as William Jeffers was in *Jeffers v. Lampson*, *supra*, and just as Charles L. Phillips was to his release of a legacy in *Wheelen v. Phillips*, *supra*. But their interest on the death of the widow became vested in James, John, the two sisters, and the heirs of Robert.

The fact that the will provides that the share of the one or ones who died before their mother shall go to the brothers and sisters surviving and heirs *per stirpes*, is a clear demonstration

that the shares devised to Robert and David did not vest until after their death, nor until the death of the widow, because the will is so framed that it provides for a distribution in such event to persons who stand in unequal degrees, between persons who claim by representation. Because of that fact the testator directs that the distribution shall be made *per stirpes*. If the testator had not intended the children of any deceased child to be beneficiaries he would not have specially directed distribution to children and heirs *per stirpes*.

This is unmistakable proof that the executory interests never became vested in either Robert or David, and that the interest of David as well as that of Robert is to be distributed to James, John, Mrs. Guitner, Mrs. Hughes, and to the children of Robert, *per stirpes*.

Robert received \$19,955.60 and David received \$20,064.42, a total of \$40,020.02, which should have been distributed *per stirpes* between the survivors and their legal representatives. One-fifth of this sum became vested in the children of Robert, while one-fifth thereof became vested in each of the surviving children, James, John, Mrs. Guitner and Mrs. Hughes.

I have been unable to perceive any equitable ground or basis for concluding that the children are in any wise bound by the acts of their father, who had no vested interest, and have no legal right to any of the money paid to him by the executor.

According to the will the whole \$126,787.64 which was distributed to the children of the testator should have been invested and held for distribution until the time fixed by the will. The children of Robert Westwater are entitled to one-fifth of all that has been advanced.

It is to be observed finally that while the judiciary may in equity hold the immediate parties, when living, to their contracts and agreements when fairly made, after their contingent interest has become fully vested, still it can not substitute its will and the agreement of deceased and living beneficiaries, for the solemn devise of the testator which operates and becomes effective upon conditions provided therein.

The executor held the moneys of the estate as a trust to be vested on the happening of certain conditions, not to be distrib-

1915.]

Westwater, Admr., v. Gußner et al.

uted by him in contravention of the will, or upon agreement between persons having no vested interest.

9. THE WILL OF DAVID WESTWATER TO JOHN AND SISTERS.

David Westwater died before his mother, and before the time of distribution fixed by the will. He made a will by which he undertook to devise and bequeath the share devised to him in his father's will to his brother John and his two sisters. The will of David can have no legal or equitable force and effect. An executory devise is by nature contingent, and subject to the limitations contained in the will. David did not have any interest that he could devise.

Nothing need be further stated concerning this matter, except by way of explanation of certain statements found concerning the alleged right to devise an interest given by way of executory devise.

The following statement is made in the Note to 56 Am. St., 360, viz:

"All contingent estates of inheritance, as well as springing and executory uses and possibilities coupled with an interest, where the person to take is certain, are transmissible by descent and *devisable* and assignable."

Nimmo v. Davis, 7 Texas, 26 (1851), is cited. There was no question of the validity of an executory devise such as is involved in the Westwater will, so the statement has no application.

Kent in his *Commentaries* (Vol. 4, p. 285), states:

"These executory interests, whether real or personal estates, like contingent remainders, may be assigned or devised, and they are transmissible to the representatives of the devisee, if he die before the contingency happens; and they vest in the representatives, either of the real or personal estate, as the case may be, when the contingency does happen."

The statement is not entirely accurate, and does not apply to the case at bar.

The learned chancellor, however, at another place in his treatise, Vol. 4, p. 261, states:

"All contingent and executory interests are assignable in equity, and will be enforced if made for a valuable consideration; and it is settled, that all contingent estates of inheritance, as well as springing uses and possibilities, coupled with an interest, where the person to take is certain, are transmissible by descent, and are devisable and assignable. If the persons be not ascertained they are not then possibilities coupled with an interest, and they can not be devised or descend, at common law."

There is no possibility coupled with an interest involved in this case. And executory devise such as David had under his father's will, could not be devised by him, because it was contingent and never became vested in him. The learned chancellor and author could not have had in mind such an executory devise when the above was written. It is not a correct statement as applicable to this case. The learned author stated in a note:

"But where there is a devise of White acre to A, and of Black acre to B, and if either of them die without issue, his estate to go to the survivor, and both be living, such a possibility can not be assigned, or released, or devised, or pass by descent, and can only be extinguished by estoppel." *Jackson v. Waldron*, 13 Wend, 178; 4 Kent Com., 262, Note.

This is the case and doctrine which Wood, J., in *Jeffers v. Lampson*, 10 O. S., refused to follow. wherein the court sustained a relinquishment between the beneficiaries themselves.

It is to be observed that Chancellor Kent and the authority cited by him, was considering contingent and executory interests without distinguishing between such devises by contingent remainder in fee, and executory devises.

All the beneficiaries by name and interest were not fixed and definite and certain by the will of Westwater; only part of them were fixed and definite at the time of the execution of the will, and these were liable to be changed, as afterwards they were, by death. Hence it follows that under the will here involved there was neither a contingent remainder, not a possibility coupled with an interest as that term is defined. It follows that David had not vested interest, or possibility coupled with an

1915.]

Westwater, Admr., v. Guitner et al.

interest which he could by a will devise to his brother John or his sisters.

Under the topic: "The Devise and Bequest is an Executory Devise or Interest Clearly Distinguished for a Possibility Coupled with an Interest and Contingent Remainder" it is clearly made to appear that the rule applicable to a release of an "executory devise and bequest," or of a "Possibility Coupled with an Interest" is radically different; that an executory interest such as is contained in the will in this case can not be devised, and that a possibility such as David had under his father's will, was not one coupled with an interest because the beneficiaries were not definitely ascertained and fixed by the will, and that therefore the contingent interest which David took under his father's will could not be devised to any one or more of the beneficiaries named in such will.

The interest which a contingent devisee takes is not a vested one like the fee in the case of a contingent remainder. The latter is vested subject to be divested, while the contingent executory devise does not vest at all until the event occurs which passes the devise.

One who takes the vested fee of a remainder takes it subject to the contingency that it may be divested upon a subsequent event, but with knowledge that if the contingency finally vests the estate in the grantee, it becomes an indefeasible estate.

That is, if William Jeffers, as in *Jeffers v. Lampson*, *supra*, had assigned his contingent fee to Lampson instead of to his brother Henry, and William had died, the estate would have become vested in Henry Jeffers, and Lampson would have been divested of the estate.

So it thus appears that a transfer of a contingent remainder will not become vested unless the devisee survives the contingent event.

In *Jeffers v. Lampson*, *supra*, though William conveyed to Henry, the latter not surviving, the contingent remainder in fact became vested in William. Lampson purchased the contingent interest of Henry, but as William, who had released his interest for a valuable consideration, survived, his conveyance became operative in favor of the assigns of his brother Henry.

So it is thus seen that even the assignment of a contingent remainder, though supported by a present estate, may be defeated by death of the grantor thereof before the happening of the contingency which divests such grantor thereof, and invests it in another devisee who survives the contingency.

Thus we see how a grant or release of both a contingent remainder and an executory devise may alike be defeated, so that any one who may take an assignment thereof subject to the contingencies must assume the risk.

An assignment or release of either a contingent remainder or an executory devise will take effect in equity when the subject to which it refers has "ceased to rest in possibility," and has "ripened into reality" (*Pierce v. Robinson*, 13 Cal., 116, 124; *Ridgeway v. Underwood*, 67 Ill., 419); or when the assignor is in a condition to give it effect (*Bailey v. Happin*, 12 R. I., 568). A sale, assignment or release can only be enforced in equity, after the death of the life tenant, or of the happening of the contingent event, and after the expectancy has fallen into possession. And this may be done as a right of contract. *Ridgeway v. Underwood*, 67 Ill., 419; *Crum v. Sawyer*, 132 Ill., 443; *Brown v. Brown*, 66 Conn., 493, 498; *McDonald v. McDonald*, 5 Jones Eq., 211; 75 Am. St., 434.

Executory devises were made possible only by the Statute of Wills. But there is no rule in common law, and no rule of American decision that can give life or legal effect to a devise by a beneficiary of an executory devise contingent on his own survival of a precedent life interest. Hence it must be concluded that the will of David Westwater is ineffective in law or equity and that the contingent interest devised to him became, on his death, and the death of his mother, vested in the beneficiaries surviving the widow and their heirs, *per stirpes*.

10. FACTS AND CIRCUMSTANCES CONCERNING AGREEMENTS EVIDENCED BY QUIT-CLAIM DEEDS AND ASSIGNMENTS OR RELEASES BY ROBERT WESTWATER AND JAMES WESTWATER.

The quit-claim deeds by Robert and wife, and by James to their brothers and sisters, and by the latter to James, may not

1915.]

Westwater, Admr., v. Guitner et al.

be regarded as legal conveyances, because none of them at the time of their execution had any legal estate or interest in lands that could be conveyed by either to the other. They can only operate to estop those who have survived the widow from denying the binding character of it in equity; or it may be considered as a contract in equity binding him to actually release his interest when it becomes vested in him.

Neither can the paper writing signed by Robert to James and the other brothers and sisters, and by James to David, John and the sisters purporting to be an assignment of the interest of Robert and James, be considered legal transfers of their interests, because they were not possessed of a legal interest. They constitute mere equitable contracts on their part to make such releases when the interests become vested in them.

The agreement made March 19, 1900, by all the parties, ratifying past alleged advancements, is not to be viewed as an authorized legal document, nor as a legal transfer, but like the other paper writings it is to be looked upon as but one of the chains in the circumstances and transactions to be considered in adjusting the equities between the parties. Having no vested interest at the time, nothing but a mere contingent one, by law one beneficiary may only be held in equity to relinquish the executory interest to another beneficiary, provided the agreement made is fair and reasonable and provided the same was entered into in good faith, and provided the same is free from inequitable conduct or fraud, actual or constructive. Only under such conditions may such releases be sustained in equity. And when the interest vests, such beneficiary may be compelled in equity to perform his contract to relinquish his interest when the same becomes vested in him, if the foregoing requirements be complied with.

James Westwater claims that David Westwater, acting for himself and his brother John and sisters, falsely represented to him that the sum of \$25,299.80 and the property conveyed to him constituted his full share of the estate; that he (James) was ignorant of the value of the estate, especially of the value of the business, and the amount invested therein; that he relied upon such representations.

The burden of the complaint made by the legal representatives of Robert and James Westwater is that neither Robert nor James had adequate knowledge of the extent and value of the estate.

The business of the estate had been carried on from February 26th, 1894, the death of the testator, to the dates of the releases made by Robert and James (July 7, 1900, by Robert) and August 20, 1902. There had at that time been accumulations of profits from the business. These had been invested by way of improvements in the North Kerr Graveyard property, while some of it has been invested in bank stock. These transactions were all shown on separate books which David kept as executor, and were kept at the store. It does not appear that opportunity was offered James to examine the books or to obtain any information therefrom concerning the condition of the business or of the estate.

The investments by way of improvements of the graveyard property and in bank stock—the latter in David's individual name—was contrary to the specific directions of the will. By reason of the improvement of that real estate its income was greatly increased, and by reason thereof special agreement was made by the executor with the two "daughters" to whom the income was given, by which it was agreed by the executor and the "daughters" that the latter should be paid but the sum of \$100 per month each, the remaining rentals going into the estate account.

The dividends from the stock were paid to the account of the estate.

The executor failed to make the invoice as required by the will, so that other beneficiaries had no opportunity of knowing the value of the stock in the beginning. But one invoice was made of the store during the continuance of the business, which was some years after the death of the testator.

The circumstances under which David went to California disclose that Robert had been importuning him for money, and that he was determined upon ending this. The fact that Robert was hard pressed, and the testimony of Mrs. Robert Westwater tends to show that some pressure was used in getting her signature.

1915.]

Westwater, Admr., v. Guitner et al.

It is established that David did not communicate to James the fact that Robert had relinquished his interest to James, David and the rest. The manner of the negotiations between David and James, through the son of the latter, if we have all that took place and that was communicated, was on its face not reasonable and fair. An examination of the executor's accounts filed in court would not sufficiently advise either Robert or James of the condition of the estate, and especially of the profits from the business, and of the accumulations of the profits therefrom and their investments.

A contract was made with the executor with the employees of the store by which a profit-sharing partnership was entered into, paying to the estate an arbitrary rate of interest on a valuation of the store at \$100,000. This was not within the powers of the executor. Whether it was advantageous or not does not matter, because it was not authorized. It was not made known to James and Robert so far as the evidence discloses.

The evidence discloses that on inquiry James was told by the executor that it was none of his business how the store was doing.

The will required that: "careful books of account of said business shall be kept and an invoice of stock shall be taken during the first year after my decease, which invoice and accounting of stock shall be put in writing and preserved."

No invoice was made. If careful books were kept, they were not inspected by James and Robert, and even John, who was connected with the business, had little knowledge of them; as he left everything to David. It is apparent that David pursued a course of management of the business and of the estate according to his own notions, and did not give heed or regard to the obligations of the will. He did not make use of the surplus from the business as required by the will.

Careful examination has been made of the official accounts filed by the executor in the probate court, with a view to ascertaining whether the heirs, especially James, who lived here, could gain any definite knowledge as to the condition of the estate.

The first account filed, March 22, 1895, gives receipts and expenditures in the business of the store. It shows bank deposits and store disbursements. It shows the payments to the daugh-

ters of what probably is rent. It shows one payment to "R. Westwater" of \$1,000 and another of \$1,500. The balance is \$4,339.34.

The account filed October 7, 1896, shows receipts and deposits in Deshler National Bank and store disbursements, leaving a balance of \$133.03. Another account was filed November 16, 1896. This appears to be an executor account, not a mere store account. It gives names of many different persons from whom money was received. But the items are not explained and are not intelligible. It shows an advancement to "R. Westwater" of \$1,000. It shows no investments or surplus, that is, no statement is made at all. An account filed December 30, 1897, shows a number of "advancements" to "R. Westwater," and to Robert Westwater, and to Mrs. Hughes. Nothing is stated concerning profits or business. An account filed November 16, 1905, shows merely bank deposits and nothing concerning investments.

The accounts are unsatisfactory and not in good form and do not disclose the condition of the estate.

They are of such character as to impart no knowledge of the condition of the estate or its value. No record or evidence has been offered of the amount of money invested in the graveyard property, of the amount of rents derived therefrom. Nothing appeared in the accounts concerning the large investments in bank stock.

A showing was made on behalf of plaintiff with a view of proving that at the time James Westwater executed his quit-claim and assignment that the amount his father had advanced to him and the value of the Oak street property attempted to be transferred to him was as much as his share was worth. But this fails to meet the fact that no adequate information was furnished.

11. LEGAL DUTY AND EFFECT OF CONDUCT OF THE EXECUTOR IN QUIT-CLAIMS AND ASSIGNMENTS.

The legal obligation of an executor or trustee in dealing with the subject of his trust, springs from the conscience of man, being founded on principles of honesty and fair dealing. The duty exacted by law takes into account the mistakes of judgment and

1915.]

Westwater, Admr., v. Guitner et al.

unconscious influence of self-interest of men who have no intention of wronging another. We have here the case of a long period of management of trusteeship by a trusted, honorable trustee, with the laws prescribing his powers and duties by his father's will. These may not have been of the same impelling force as would the laws of the state have been upon his mind; human self-interest for the interests of beneficiaries played an important part. New conditions not contemplated or foreseen by the testator had arisen. This operated on the desires contrary to the law of the will. Under the sanctioning influence of harmonious sisters and brothers interested alike, with a feeling, no doubt, that another brother apparently had little or no interest because of advancements, while another apparently improvident brother resides in a distant place, one can perceive how the most upright person, who has an equal interest in the subject of the trust, who is given full power in its management and control, and under strained feelings between beneficiaries, may unconsciously be partial to his own interest and of his duty.

The fidelity and business acumen of the executor in the administration of the trust produced results of great advantage to the estate. These the father contemplated for the good of each and all of his sons and daughters, and their legal representatives. It was not intended that either should have the advantage. Of course the testator did not intend that the trust was to be conducted as it was, but it was intended to be for the equal benefit of all, whether one had a goodly share of his part before or after the father's death, or whether one was improvident or otherwise. It was intended that the accumulations and the value thereof were to be for the equal benefit of all. It was not intended that if the management was successful and a goodly estate should be builded up and preserved, so that if it was advantageous to preserve and keep the estate intact and not in accord with the plan of the testator, that each and all of the beneficiaries should not equally participate and share the benefits. Each of the beneficiaries should have had the privilege of electing to retain his interest, whatever it was, in the estate, in the condition in which it was, if it was deemed best for all to depart from the plan of the testator, and the law of the will.

By reason of the conduct of the administration of the trust they were not all treated alike, and they were not given the chance of exercising a choice, if the law of the will was to be departed from. All information was not given to each and all of the beneficiaries by the executor, but his plan and administration was accepted by some with trust, confidence and acquiescence, while others under the disadvantage of inequality of position and lack of information were not in a position to have or exercise a choice.

The plan of the testator was to keep the estate intact until a definite period; if changed conditions and profits from the business expended on the realty made it grow in value, those who had received large advancement had their proportionate interest in it. When asked to relinquish his rights, the executor should have communicated to him all the information that would have enabled him to exercise an intelligent choice.

If there be feeling of contentment with the conditions of the real estate, or the business, giving rise to a desire to disregard the plan of the will, and not to sell out the property and divide it according to the term of the will, such plan may only be carried out by imparting full information to and knowledge of any whose interest it may be the desire to purchase.

Lord Hardwicke more than a century ago declared: "The court looks with jealous eyes at the trustee purchasing of the *cestui que trust*." (8 Ohio, 58.)

Wood, J., in *Welsh v. Perkins*, 8 Ohio, 52, 56, quotes with approval from Chancellor Kent in *Davoue v. Fanning*, 2 Johns Ch., 262, as follows:

"Whether a trustee buys in for himself or his wife, the temptation to abuse is nearly the same. *His interest interferes with his duty.* * * * If a trustee, acting for others, sells an estate, and *himself* becomes the purchaser, or interested in the purchase, the *cestui que trust* is entitled to come here, *as of course*, and set aside the purchase."

Wood, J., says of the rule:

"It is salutary and necessary to repress fraud and circumvention."

1915.]

Westwater, Admr., v. Guitner et al.

Wood, J., further quoting Chancellor Kent, states:

"A trustee can gain no advantage to himself to the detriment of those for whom he holds the trust. The most frequent application of this doctrine is in cases in which the trustee purchases the subject of his trust. In such cases equity will vacate the sale. The objects of the rule are to secure fidelity on the part of the trustee and preserve the interests of those whose rights are confided to his care."

Wood, J., on his own account, states:

"The rule, in all cases cited, receives our warmest approbation as a well-settled salutary principle in equity, that where *interest and duty conflict, the former must yield and give place to the latter.*"

Johnson, J., in *Pratt v. Longworth*, 27 O. S., 159, 195, speaking of a trustee acting in such dual capacity, states:

"He is engaged in serving two masters, when good faith demands that he shall serve but one. His position was one demanding the utmost good faith—the *uberrima fides* of the Roman law. It is a salutary and sound principle that agents to sell can not be purchasers; that the character of seller and buyer are so entirely incompatible that they never can be united in the same person; and generally, that trustees of every description, who have the power to sell, can not, by direct or indirect means, become the purchasers of trust property. *In such cases the court will not suffer itself to be drawn aside from the application of this equitable rule by any attempt on the part of the purchasers to establish the fairness of the purchase, because of the danger of imposition and the presumption of fraud, inaccessible to the eye of the court.*"

"The *cestui que trust* may deal with his trustee, so that the trustee may become purchaser of the estate. But, though permitted, it is a transaction of great delicacy, and which the court will watch with utmost diligence, so much so that it is hazardous for a trustee to engage in such a transaction." Lord Eldon in *Coles v. Threthick*, 9 Ves. J. R., 234, quoted 115 Am. St., 24.

Such a transaction is by weight of authority and reason, concededly not void, but merely voidable at the election of the *cestui que trust*.

The following appears to be the most complete and luminous statement of the rule:

"The trustee shall not take beneficially by gift or purchase from the *cestui que trust*; * * * *the question is not whether or not there is a fraud in fact; the law stamps the purchase by the trustee as fraudulent per se, to remove all temptation to collusion and prevent the necessity of intricate inquiries, in which evil would often escape detection, and the cost of which would be great.* The law looks only to the facts of the relation and the purchase. The trustee must not deal with the property for his own benefit. * * *

"But, there are exceptions to the rule, and a trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the circumstances; that the *cestui que trust* intended the trustee to buy, and there is a fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. The trustee must clear the transaction of every shadow of suspicion. * * *

Any withholding of information, or ignorance of the facts, or of his rights on the part of the *cestui que trust*, or any inadequacy of price, will make such purchaser a constructive trustee." *Perry on Trusts*, Section 195; *Reeder v. Meredith*, 78 Ark., 11; 115 Am. St., 22; *Woerner Admn.*, Section 487, *et seq.*; *2 Pomeroy's Eq.*, Section 958.

Some loose expressions by courts and text-writers seem to warrant the assumption that a purchase is void at all times, and under all circumstances, but the weight of authority is to the contrary. *Shelby v. Creighton*, 65 Neb., 485; 101 Am. St., 630; *Hammond v. Hopkins*, 143 U. S., 224; *VanDyke v. Johns*, 1 Del. Ch., 93; 12 Am. Dec., 76; *Litchfield v. Cudworth*, 15 Pick., 23; *Munn v. Burgess*, 70 Ill., 604; *Boyd v. Blankman*, 29 Cal., 19; — Am. Dec., 493; *Foxworth v. White*, 72 Ala., 224; *In Re Patterson* (N. Y.), 20 Atl., 486; *Morgan v. Fisher*, 82 Va., 417; *Helms v. Pabst Brew. Co.*, 93 Wis., 153; 57 Am. St., 899; *Houston v. Bryan*, 78 Ga., 181; 6 Am. St., 252; *Comegy v. Emerick*, 134 Ind., 148; 39 Am. St., 245; *Linman v. Riggins*, 140 La. Ann., 761; — Am. St., 549; *Mason v. Odum*, 210 Ill., 47; 102 Am. St., 180.

The fact that it may appear that the beneficiary was of sound mind, and understood the nature and effect of the contract is of

1915.]

Westwater, Admr., v. Gultner et al.

no avail unless it is made to appear that he had full information and complete understanding of all the facts concerning the property and the transaction itself, as much as did the trustee, the executor with whom he was dealing. It must appear that the trustee made to the beneficiary a perfectly honest and complete disclosure and information concerning the estate, the extent, condition and value thereof. *Ludington v. Patton*, 111 Wis., 208. See *Caldwell v. Caldwell*, 45 O. S., 512.

It is clearly and convincingly established:

1. That the plaintiff, upon whom the burden is, failed to prove that full information was made to either Robert or James.
2. The surplus or profits of the business was not made known.
3. The value and condition of the stock was not disclosed.
4. The profit-sharing partnership contract with employees was not made known to them.
5. The amount of profits or surplus invested in the graveyard property was not made known.
6. The income from the graveyard property was not made known.
7. The investment in bank stock and the amount thereof was not made known.
8. The amount of the unauthorized or ratified advancements was not made known.
9. The fact that Robert had quit-claimed and assigned to all was not made known to James.

The brief of counsel for plaintiff concedes that Robert "got within a few thousand dollars of one-sixth of what was in the estate at that time."

It is not shown by clear and convincing proof that James received the reasonable value of his share, this duty devolving on plaintiff.

On the contrary, in addition to the material facts not made known to him, James and Robert had no opportunity to make a "jealous and scrupulous examination of all the circumstances," they were not made acquainted with all the facts so that there could have been a full understanding of their rights so that they could make "a distinct and clear contract." They were not sufficiently informed so that they, too, could exercise a choice

of retaining an interest in the real estate as it had been improved with the money of the estate.

It will not do for the plaintiff or for counsel to argue that there would have been no estate for any of them had it not been for the skill of the executor in its management. The testator named him for that purpose; he provided for his compensation, which he did not have to accept if he did not so desire. But he was to manage it for the benefit of all the beneficiaries.

He was arbitrary in his management, disregarding the provisions of the will in material respects. His individual negotiations to obtain the assignment of Robert and James, like other of his acts, were in disregard of the will. His acts in obtaining such releases or assignments, together with the fact that he made a will devising his contingent interest in the estate to John and his two sisters, disclose his partiality and favoritism, which shows reasons for his acts.

One may imagine that he might reason with himself that he had kept the business going; that he had made it successful, and had made the estate valuable, and that James and Robert had had no part in it; that James had had his share even before his father's death; that Robert was far away and not successful and constantly importuning for money, while he and John did the work, and the other two were sisters, to be favored as women are.

The answer to such a view is that that was his father's will; and if he followed it in one respect he should follow it in all respects. He had no right in equity to disregard the terms of the will, which he so materially did, without the express consent of the devisees and the sanction of the court.

The manner of preparing the account has much to do with the equities between the complaining beneficiaries and the executor and the other beneficiaries. They did not comply with the law in some respects.

The agreement of March 30, 1900, was in the nature of a ratification of past irregularities, but may not be considered to have authorized the quit-claims and assignments that followed.

Much stress is laid on the fact that objection was not made until the lips of the executor are sealed. The trustee should have

1915.]

Westwater, Admr., v. Gultner et al.

filed accounts which would have shown the true condition of the estate, and should have submitted the question of the departure from the will to the court before making distribution to beneficiaries. The present unfortunate situation might have been avoided.

The executor seemed never to have realized that he was trustee for *all contingent* interests; he thought of no interests except the living; he did not contemplate the consequences of death.

In conclusion, it is apparent that the instruments of writing, quit-claim deeds, agreements and releases, have no force and effect at law; that they may only be considered in equity by way of estoppel between the survivors.

As to the instruments executed by James, the situation is different. He survived all contingencies and they may, if fair and reasonable, and free from fraud, be given effect against him.

But the court finds that they may not be considered valid in equity as releases of the contingent executory interests because:

1. There was concealment.
2. Advantage was taken by the executor of information.
3. The transactions are not free from suspicion.
4. Information was withheld.
5. There was ignorance of the releasing beneficiaries.
6. There was a failure to file accurate or sufficient accounts.
7. Consent and ratification of material departures from the will was not given with knowledge.
8. The executor and the beneficiaries favored by him gained a material advantage over the two who executed the releases.
9. The individual interest of the executor interfered with his duty, and he would have profited by his acts had he lived.
10. As it is, those for whom he acted in obtaining the releases will have an apparent advantage if the same are upheld.
11. If there is an advantage to the beneficiaries in holding the real estate, instead of selling it and distributing the proceeds according to the will, those who executed releases were not given full and equal opportunity of exercising an election.

The court, for the reasons stated, holds the quit-claim deeds and written assignments voidable in equity, and adjudges them null and void.

12. IMPROVEMENT AND RENTAL OF KERR NORTH GRAVEYARD
PROPERTY AND PAYMENT FROM RENTALS TO
ELLA AND CARRIE.

The administrator asks direction as to the validity of the acts of the executor concerning the improvement and rental division with Ella and Carrie. As the property stood after the death of the testator, the same produced a rental of \$600 per annum, which was paid to the daughters according to the will. After the improvement of the property \$100 per month was paid to each of them. It is not made to appear how much money was invested by way of improving the property. This was not a compliance with the will, and it does not appear that the executor consulted with the beneficiaries or obtained their consent to the new arrangement. But no agreement or consent which gave an undue advantage to any beneficiary would have bound the heirs of Robert. This arrangement, however, should be binding in equity upon those having knowledge, or who acquiesced in it. It is binding upon John, Carrie and Ella, but not upon James or the heirs of Robert.

The conclusion of the court being that James and the children of Robert have a proportionate interest in the estate, it follows that there must be an accounting of the interests. The point made as to the new plan being binding upon Carrie and Ella, was that they having acquiesced in the new plan and a new arrangement, they are equitably estopped from claiming by the strict letter of the will.

The equitable rights of each and all the beneficiaries as they stand now, may only be determined by an accurate accounting of the whole trust and its administration thereof, with careful computations of interest.

The only way that the rights of Carrie and Ella can be accurately adjusted with those of the others, is to make computation of the probable value of their rights according to the condition of property before its improvement, and after the improvement. In this way only may it be determined whether \$100 each per month was equitable.

1915.]

Westwater, Admr., v. Guitner et al.

13. ADVANCEMENTS.

The administrator asks direction concerning the right of the executor to make advancements, and the validity of the same, and the duties of plaintiff and the rights of the parties in connection with the payments.

Under the law of the will and the "law of the land" the executor had no legal right to make such arrangement, or to make such payments. And the beneficiaries themselves had no right to make an agreement between themselves which could be binding upon the children of a beneficiary dying before the widow.

The agreement of March 19, 1900, recites that the beneficiaries had requested advancements of a portion of their shares at different times, and prevailed on the executor to advance them money at different times. It recited that each of them was fully aware of the provisions of the will relative to "the distribution and settlement of said estate." It was to operate by way of consent and release, and to relieve the executor, as such, and as an individual from any liability.

If all the conditions and facts were made known to each and all of them; if the precise interest of each were made known, then it may be considered as equitably binding upon all who survived the widow and whose interests became vested. It may not be held effective so far as the interests of David and Robert, which go to the children of Robert. If the agreement was entered into with full knowledge, without constructive fraud, then it will operate to equitably estop James, John, Carrie and Ella from claiming their proportionate share of that which David "advanced" to himself, provided they knew that he had paid himself the sum of \$20,064.42. By this agreement, John, Ella and Carrie are estopped from claiming any part of that which each received. If James had full knowledge of all the facts, he is estopped from claiming any interest in the \$19,955.60 paid to Robert, the \$19,215.97 to John and the \$14,531.40 to Carrie and the \$20,130.25 if made prior to March, 1900. He is not bound by this document, unless he was fully advised.

As the agreement of March, 1900, had no apparent reference to "advancements" to David himself, I am of the opinion that

none of the parties are estopped from claiming their one-sixth interest in his estate irrespective of the amount of money he paid himself, unless it be shown by evidence that they actually knew he had paid himself money and acquiesced in it. This agreement, by its specific terms, had relation only to advancements made prior to its execution. It does not specifically agree to or authorize advancements subsequent to its date. It is agreed and reiterated, in addition to the receipts, that the several sums of money advanced is to be deducted from their shares:

"We, the undersigned, therefore being of sound mind and memory, each of us fully realizing that any and all of said advancements, of every kind and description, heretofore made, *or that may hereafter be made* to each of and all of us have been so made, and so advanced to us for our own good and for our own benefit, and for the benefit of our own individual estate, and not only for the benefit of ourselves, but for the benefit of our heirs, executors, administrators and assigns."

The parenthetical words, "*or many hereafter be made*" should not be held to be binding in equity to future or subsequent departures from the will in the way of distribution.

The \$5,350 advanced by the testator to Robert and the \$25,299.70 to James, are binding. None of the "advancements" are binding on the children of Robert excepting those made by the testator. The children of Robert are entitled to one-fifth of the whole estate, and James, John, Ella and Carrie are entitled to one-fifth of the estate.

The estate of David, the executor, is liable for the moneys paid to himself and to Robert, to the children of Robert. In computing the interest going to the children of Robert all "advancements" should be counted in as part of the estate, together with interest, except that interest is not to be computed on advancements made by the testator.

In computing the interest of John, Ella and Carrie, the "advancements" made them with interest is chargeable to them.

James is entitled to one-fifth of the estate, but is estopped from claiming anything on account of the "advancements" ratified by the agreement of March, 1900, with his knowledge and

1915.]

Westwater, Admr., v. Gultner et al.

acquiescence. He is not entitled to hold title to the Oak street property; the deed to him by David, John, Carrie and Ella is declared null and void.

The "advancements" made by the present administrator to Ella, \$12,515.98; to Carrie, \$12,452.72, and to himself of \$12,452.70, totaling \$37,421.40, were made without authority of law and must, of course, be taken into account in arriving at the total amount of the estate. These payments, of course, were made under the impression that no one had any interest in the estate but the three persons named.

No more definite conclusion concerning these matters can be made without further evidence and an accurate accounting. Further evidence will have to be taken concerning the Oak street property in order to dispose of that question of its use by James. The court might, however, conclude that the agreement of March, 1900, is not binding upon James, because the burden is upon the plaintiff to show that he did have knowledge. But a definite conclusion will not be made on this matter without further hearing.

14. ESTOPPEL OF LACHES.

It is claimed that the cross-petitioners are estopped from seeking the relief which they ask. A complete answer to such claim is that there can be no estoppel without full knowledge. If one be ignorant of his rights, whether of fact or law, there can be no estoppel (*Brown v. Sutton*, 29 U. S., 238, 249; *Hammond v. Hopkins*, 133 U. S., 24). The burden is on the trustee to show knowledge.

The reason for declaring the releases by James to be null and void was because of his ignorance of essential facts relating to the estate and his interest therein. It must follow that he can not be estopped. Mere lapses of time will not constitute laches. I am familiar with the decision of Bigger, J., in *Peters v. Firestone* concerning laches or estoppel. It applies to this case.

I have considered the instruments of release by James as voidable. But this is not true of those by Robert, and of the quit-

claim by David to James. These are void. There can be no estoppel under such conditions.

Ten years have elapsed since James executed the instruments, but no statute of limitation applies to this cross-petition. He had no vested right until after the death of his mother. The only way the instrument may be vitalized is by the equitable doctrine of estoppel. So finding the equities in his favor ends that.

It has been decided that a contract of an heir to release his expectancy in an estate is not, however, enforceable until the death of the ancestor, and no cause of action accrued thereon until that time. *Clendening v. Wyatt*, 54 Kan., 523.

15. PARTNERSHIP AGREEMENT FOR CONDUCT OF
STORE, MARCH 2, 1908.

The contract made by the executor for the conduct of the business in the form of a partnership agreement with the clerks in the store must, under the conclusion reached in this decision, be held to be unauthorized, and therefore null and void. This was after the instruments had been obtained from Robert and James.

The interests of the beneficiaries in the business or profits thereof may only be ascertained on an accounting.

16. OTHER MATTERS.

An accounting should be taken of the store business up to the time it was closed out.

The business, if not now closed out, should be sold and closed up.

While the executor had no authority to borrow money to improve the realty, still, having done so and the beneficiaries having received the benefit of it, the \$36,000 borrowed should be paid by the estate.

If the payments to the widow in their total equalled the amount to which she would have been entitled under the will, they may be confirmed without regard to how and in what amounts they were paid.

1915.]

Westwater, Admr., v. Guitner et al.

17. POWER OF ADMINISTRATOR DE BONIS NON TO
SELL REAL ESTATE.

The rule in respect to a power conferred by will upon an executor to sell real estate and to make deeds is that when the same appears to be purely personal, an administrator with the will annexed does not have such power, but must obtain an order of the sale from the court. If the power is annexed to the office and part of the trust, it passes to the administrator.

The power conferred by the will is regarded as purely personal, and the opinion and decision is that the present administrator does not have the power to sell the real estate without an order of court.

It is apparent that a final decree can not be rendered in this case without taking further evidence and perhaps without an accounting so as to determine the respective interests of the beneficiaries.

Final decision is not now made concerning the binding character of the agreement of March, 1900, upon James, nor in respect to the Oak street property. Nor can decision be made respecting the amount paid to the sisters from the graveyard property, as before stated.

The accounting would have relation specifically to the business, investments and real estate. But I am not sure that an accounting, as the case now stands, would be entirely proper; so no order will be made unless it may be shown to be desirable or advisable.

It may be that the essential points concerning the interests of the beneficiaries having been determined that is all that need be decided in this proceeding.

A decree may be drawn and entered embracing the findings and conclusion contained herein.

**PASSENGER AFTER ALIGHTING STRUCK BY CAR ON
PARALLEL TRACK.**

Common Pleas Court of Hamilton County.

ANNA RUDIN, A MINOR, v. THE CINCINNATI TRACTION CO.; AND
MAX RUDIN v. THE CINCINNATI TRACTION CO.

Decided, December 1, 1915.

*Negligence—Degree of Care Required by Traction Company—As to
Safety of One Who Has Alighted and is Attempting to Cross
Parallel Track—Charge to Jury Must be Considered as a Whole—
Instructions as to Contributory Negligence.*

1. A street car company is required to exercise only ordinary care toward persons who have left the car and are proceeding to cross a parallel track. The relationship of carrier and passenger ceases after the passenger has alighted in safety.
2. A charge defining contributory negligence and directing the jury to apply the definition in the event of finding a given state of facts is not withdrawing the question from the consideration of the jury.

*Nelson & Hickenlooper and J. E. Rappoport, for plaintiff.
Kittredge, Wilby & Stewart, contra.*

MAY, J.

The two cases, that of Anna Rudin, a minor, an action for personal injuries, and Max Rudin, her father, for loss of services, against the Cincinnati Traction Company, were tried as one case, and the jury found for defendant returning two verdicts. Motions for new trials were filed in each case.

Anna Rudin got off an outbound car and in passing behind the car to cross the parallel track was injured by an inbound car.

The verdict is not manifestly against the weight of the evidence; in fact the evidence was conflicting, and if there are no prejudicial errors of law the motions should be overruled.

The plaintiffs have filed a voluminous brief in support of the motions for a new trial. In deference to the earnestness of counsel, I shall consider every point urged.

1915.]

Rudin v. Traction Co.

I. "The court erred in instructing the jury upon the question of contributory negligence," because the answer was a general denial.

In view of the decision of the Supreme Court in *Rayland Coal Co. v. McFadden, Admr.*, 90 Ohio St., 183, at page 194:

"When the evidence on the trial develops a situation in which it is disclosed that the claims of neither of the parties as stated in their pleadings as to proximate cause have been sustained, but that both have been negligent in such essential matters as combined to be the proximate cause of the injury, then *it is the duty of the court to instruct the jury as to the law touching the situation so developed.*"

It is unnecessary to discuss this point of error. In fact, under both the Forrest case, 73 Ohio St., 1, and the Stephens case, 75 Ohio St., 171, if contributory negligence is raised either by the pleadings or the evidence, a charge on that issue is not erroneous.

II. "The court erred in defining the relative duties of plaintiff and defendant."

"(a). The defendant company owed more than ordinary care toward the plaintiff who had just left the car and was about to cross over the parallel track; in fact, as the plaintiff was still a passenger the defendant company owed 'the highest degree of care.'"

This is not the law in Ohio or anywhere outside of Kentucky.

In the Snell case, 54 Ohio St., 197, the Supreme Court said:

"When a street railway company operating a double track road discharges a passenger at a street crossing, having reason to know that such passenger in order to reach his destination must cross its tracks, it is the duty of such company to regard the rights of the passenger while on the crossing and to so control the speed of the cars on its tracks and give such warning of their approach as will *reasonably* protect the passenger from injury."

This can only mean that ordinary care is required of the carrier at that time. The relationship of carrier and passenger, as

far as the degree of care required of the carrier is concerned, has ceased when the passenger has alighted in safety. On this point see the following cases: *Chattanooga Electric Ry. Co. v. Broddy*, 105 Tenn., 666; *Creamer v. West End Ry. Co.*, 156 Mass., 320; also *1 Nellis Street Railways*, Section 261.

The law was fully covered in the special charge given at the request of the plaintiff and repeated on page six, paragraph two, of the general charge.

(b) "It will be observed that nowhere in the charge is the plaintiff's duty described as an obligation to make such use of her faculties as a person of ordinary care would make for her protection, but, on the contrary, the charge as given is subject only to the interpretation that ordinary care required that plaintiff should, at her peril, make such use of her faculties," etc.

In answer to this complaint it is sufficient to quote the forcible language of Swing, J., of our circuit court, in *Curry v. Cincinnati*, 12 C. C., 736, at 739:

"The charge should be read as a whole and the parts harmonized if possible. It will not do to fish out a clause here and another clause there in a charge and give them independent meaning, when, taken in connection with other parts of the charge, there would have been a different meaning."

See also *Ohio-Indiana Torpedo Co. v. Fishburn*, 61 Ohio St., 608, fifth syllabus.

What is the result of applying this test to the charge?

On page four, paragraph three, it is said: "Now ordinary care, gentlemen, and that is the *degree of care which is required in this case of both the plaintiff and the defendant.*" Page five, paragraph two: "*Now the plaintiff on her part must also exercise ordinary care.*" Again on page six, paragraph three, * * * "*but a duty rests upon the car company and the pedestrians to do what ordinary care and prudence under the circumstances would require them to do to avoid injuring each*

1915.]

Rudin v. Traction Co.

other." * * * Again, at end of page seven: "If the plaintiff * * * in other words, did not exercise such ordinary care as an ordinarily prudent and reasonable person," etc. But it is needless to quote further on this point.

III. "The charge is misleading as to necessity of contributory negligence being a proximate cause."

Under this head counsel complain that the court here and there omitted after the words "contributory negligence" or "plaintiff's negligence" the words "directly" or "indirectly."

The cases cited above, 61 Ohio St., 608, fifth syllabus, and Swing, J., in 12 C. C., 736, at 739, apply with more force to this "fine comb" (I am quoting plaintiff's counsel's own statement made upon the argument) criticism. Let the charge speak for itself.

In defendant's special charge, speaking of the plaintiff's negligence, these words were used: "*And that the negligence of both directly contributed to and caused the injury complained of in plaintiff's petition.*" And in the general charge, at the end of the second paragraph on page seven this language is used: "And that caused the accident, and the plaintiff herself was without fault on her part directly contributing to the injury." Again at the head of page eight: "*And her (plaintiff's) act directly contributed to bring about the result * * * where both parties are negligent and the negligence of both combined to produce an accident.*" Again on page ten, paragraph two, speaking of the father's right of recovery for loss of service, it is said: "If you should find that there was negligence on the part of the defendant and *no negligence on part of the plaintiff directly contributing to the accident.*"

If the jury were misled on the question of direct cause, it can not be attributed to the absence of the word "directly" from the charge.

IV. "The court erred in charging upon burden of proof."

Again counsel's "fine comb" is brought into use:

"The court falls into the error of directing the jury to weigh the evidence of one 'side,' the plaintiff or defendant, against the other 'side,' instead of weighing the evidence supporting one 'issue' against conflicting evidence."

Surely a charge, not even a noble Barbary steed, was ever carried so fine. Bring forth the charge. There it stands unhitched on pages 10 and 11:

"It (burden of proof, preponderance of evidence, greater weight of evidence, or what you will) means, if upon weighing *all the evidence in the case*, the *side* that has the burden outweighs the *side* that does not have the burden, then the *side* that has the burden has sustained the *issue*. And if, upon weighing *all the evidence* in the case the *side* that has the burden merely balances the side that does not have the burden, then the side that has the burden has not sustained it," etc.

In order to construe the direction "to weigh *all the evidence in the case*" into a direction "to weigh the evidence of one 'side' against the other 'side,'" requires strong twisters, not a "fine comb." Not even *Cincinnati Traction Co. v. Ruthman*, 13 C.C.(N.S.), 161, at 162, can accomplish this remarkable linguistic feat.

I have thus far considered seven pages of the plaintiff's brief. Five still remain. All of these are devoted to the consideration of the second special charge given on behalf of the defendant, the giving of which it is claimed was error.

That charge reads:

"If the jury should find from the evidence that the plaintiff, Anna Rudin, attempted to cross Gilbert avenue directly behind an out-bound car and *after passing* the back of said out-bound car did *nothing* to inform herself as to whether a car might not be approaching from the opposite direction on the track which she intended to cross, but stepped immediately in the way of the approaching car so that it was impossible for the motorman to have stopped the car and to have avoided the accident, the jury should find for the defendant."

It is contended that this charge is equivalent to directing a verdict for the defendant.

1915.]

Rudin v. Traction Co.

There are several answers to this: the first is that at the close of the plaintiff's case, the court overruled the defendant's motion for a directed verdict, and at the close of all the evidence the motion then renewed was overruled a second time.

This direction was equivalent to defining contributory negligence. It merely stated that if a person situated as the plaintiff was did nothing to look after her safety, then she was negligent in such a manner that notwithstanding the defendant's negligence she can not recover.

If the facts were "undisputed," as counsel intimate in their brief (page eight), then the court erred in not directing a verdict at the close of all the evidence.

Snell case, 54 Ohio St., 197, at page 201:

"If the plaintiff's conduct, as shown by the undisputed facts, left no rational inference but that of negligence, then the ruling (directing a verdict) was right; but if the question of contributory negligence depended upon a variety of circumstances from which different minds might arrive at different conclusions as to whether there was negligence or not, then the ruling (directing a verdict) was wrong."

Therefore, the court, in accordance with this decision and the decision in the Brandon case, 87 Ohio St., 187, and the Gibbs case, 88 Ohio St., 34, submitted to the jury the question: "Did the plaintiff do anything to inform herself," i. e., "If she did nothing" she was negligent and can not recover.

In this state it is still the function of the court to give the law to the jury, provided, of course, the law as given is sound.

In *Traction Company v. Johnson*, 13 C.C.(N.S.), at 435, our circuit court used the following language in commenting on a similar charge:

"It seems to us immaterial whether the plaintiff was passing over a crossing or between crossings, as he would not in either case be exercising care if he did nothing to inform himself as to whether a car might not be approaching."

See also, *Railway Co. v. Wadsworth*, 1 C.C.(N.S.), 483, affirmed without report in 70 Ohio St., 432.

If this opinion is of undue length, it is solely because it was necessary to answer in detail "the numerous errors of law in the trial of the case."

Believing that there were no errors of law prejudicial to the plaintiff's rights, the motions for a new trial are overruled

**AWARD MADE BY INDUSTRIAL COMMISSION INCREASED
BY THE COURT.**

Common Pleas Court of Hamilton County.

MAY FRANCIS V. THE INDUSTRIAL COMMISSION OF OHIO ET AL.

Decided, October Term, 1915.

Injuries Treated as Trivial by the Industrial Commission—Are Found on Appeal to the Court to Have Been Serious—Judgment Given Accordingly.

The plaintiff had five teeth knocked out and suffered various cuts on his face and body in the course of his employment. The clear weight of the testimony indicated that the spongy bone in which the roots of the teeth were embedded was splintered and the jaw bone cracked. Nervousness and headaches resulted and he was prevented from returning to work for six months. The Industrial Commission allowed him only about half of his dentist's bill and the smaller of two doctor bills. *Held:*

That the allowance should be made to include both doctor bills and the full amount of the dentist's bill including the cost of new teeth, together with two-thirds of the amount of his weekly wages during the entire time he was laid up and an allowance of \$150 to his attorneys.

Fulford & Shook, for plaintiff.

Henry G. Hauck, Assistant Prosecuting Attorney, contra.

NIPPERT, J.

This cause comes into this court by way of appeal from the action of the Industrial Commission of Ohio upon the application of May Francis, a colored man, being claim No. 44758 of

1915.]

Francis v. Industrial Commission.

the records of said commission, on the ground that the said commission denied the right of said May Francis to participate in the state insurance fund, finding that the said Francis was not disabled beyond the first week after he was hurt. This appeal is filed in conformity with the provisions of Section 1465-75 of the General Code of Ohio.

Before considering the merits of plaintiff's claim for compensation under the workmen's compensation act (Section 1465-37, *et seq.*), the court is called upon to decide whether or not it has proper jurisdiction in matters of this kind.

Without going any further into the discussion of the law pertaining to this particular question raised by the defendant, suffice it to say that the Court of Appeals of the Eighth Circuit has held, in the case of *Sam Police v. Industrial Commission of Ohio*, 24 C.C.(N.S.), 433, that where the award allowed by the commission was in a sum so grossly disproportionate to the just claim to which the plaintiff is entitled, considering all the circumstances of the case, so as to amount to a virtual total denial of claimant's right to participate in the fund, to which his employer was a contributor, and to administer which fund the defendant was charged, and where the amount awarded or the relief denied must be regarded as having been made either under some mistake or was due to passion or prejudice, it is proper for the court of common pleas to entertain a petition on appeal from such action of the industrial commission.

This court, therefore, comes now to consider the facts in the case.

It appears from the evidence that the plaintiff, a resident of Hamilton county, Ohio, was employed on or about the 13th day of July, 1914, as a barrel-tester by the Ohio Cooperage Company of Arlington Heights, Hamilton county, Ohio, at \$11 per week, and that while he was engaged in this work a hoop slipped off of the staves of a barrel, striking him in the face and inflicting the following injuries: five teeth were knocked out, namely, four lower incisors were broken off and one upper was broken; the spongy bone in which the roots of the teeth rested was splintered and small fractions or spicules thereof had to be removed

by a dentist employed by the plaintiff; he was cut about the lips, head and various other parts of the body; and there is still existing a difference of opinion among medical experts as to whether or not the plaintiff suffered a fracture of the lower jaw-bone, there is sufficient testimony before the court to indicate at least a crack if not a fracture of the lower jaw-bone at the middle point of the chin.

It is true that the first report of Dr. Hatfield, the attending physician, described the injuries in a very few words, to-wit, "Several teeth loosened, gums contused," and speaks of a disability extending over a period of one week. This was Dr. Hatfield's report to the Industrial Commission dated July 27, 1914, or about two weeks after the accident, which occurred on July 13, 1914. This report seems to have been the basis upon which the Industrial Commission felt justified in refusing the plaintiff's claim. However, on October 29, 1914, Dr. Hatfield made a supplemental report, describing the injuries sustained by Francis as follows: "A fracture of the mandible which did not completely divide the bone and which was at first unrecognized from the lack of usual symptoms of fracture, resulting in severe headaches and inability to properly masticate food." In the same report the doctor stated that the injured person was not able to work (October 29, 1914), and that he had discharged the patient from treatment July 27, 1914. At the time of the filing of Dr. Hatfield's second report the commission was in possession of a very full report by Dr. C. W. Tufts, on October 16, 1914, who had treated the plaintiff and reported the injuries as follows:

"The injured person has lost six teeth, four incisors below and two above. Said one was pulled out before the accident. Jaw was fractured in center. Much tenderness there yet. Much tenderness in temple and point of ear near joints of jaw-bone where the condyle articulates with temporal bone."

The doctor described the treatment as follows:

"Consists now of treating his general condition, pain in head, dizziness upon stooping or turning suddenly."

1915.]

Francis v. Industrial Commission.

Dr. Tufts also states that the dentist is doing some work in his line, removing small fragments of bone as they appear, etc., and further on Dr. Tufts says that the injury has resulted in pains in head near the articulations, which are quite severe, due to concussion from strike on the chin. Dr. Tufts concludes his report to the commission by saying that "in addition to the fracture through the symphysis there may have been one on his right side through the neck of the ramus for he could not chew with any force for over a month and it still pains him on both sides and is tender on pressure." Dr. Tufts is a reliable practitioner, a graduate of the Ohio Medical College of the class of '84, stands high in his profession and was subjected to a severe cross-examination on part of counsel for the defense at the time of the trial. On page three of the record Dr. Tufts reiterates that there was an incomplete fracture of the jaw and it was tender to touch at the center of the jaw; that his examination was made two months after the accident and that any fracture suffered in July would be healed two months thereafter.

On the other hand, the court has before it the letter of the chief medical examiner of the Industrial Commission of Ohio, containing the examiner's report to the director of claims, dated January 30, 1915, in which the doctor states that he had made a report on November 11th, after an examination of the patient in company with Dr. Walsh. The examiner gives no weight to Dr. Hatfield's second report and makes no mention at all of Dr. Tufts' report and characterizes the plaintiff as follows:

"The applicant is an exaggerator of the worst type, and it is a perfect absurdity from a medical standpoint that he should continue to claim that he is unable to work because he can not properly masticate his food on account of having had a couple of teeth broken."

The chief medical examiner of the commission was not called as a witness by the defense, his report above quoted was made a part of the record at the request of the plaintiff, as well as of the defendant, and the court is not inclined to give it as much weight as the testimony of Dr. Tufts, who was subject to cross-

examination and who, in the opinion of the court, has sufficiently sustained his diagnosis of Francis' injuries to warrant the conclusion that the injuries to the plaintiff were considerably more serious than indicated by Dr. Hatfield's first report and the commission's medical expert.

The court does not fail to give considerable weight to the testimony of Dr. Lang, the radiograph expert, but Dr. Lang was not positive that an incomplete fracture of the lower jaw-bone, that is, a mere crack, would show upon an X-ray photograph taken three months after the accident. He admitted that the photograph showed small particles of bone or spicules and that these were due to a splintering of the soft part of the gum, that is to say, the sockets in which the teeth rested.

After all, it is not very material whether a fracture of the jaw-bone was present or whether it was non-existing if, as a result of the accident, the plaintiff suffered pain to such a degree as to make it impossible for him to perform his daily vocation. Francis testified, and it was not contradicted, that he attempted time and again to do some work in order to provide for himself and his mother, and that the pain in his head was so intense that he was unable to continue. These subjective symptoms seem to have been entirely disregarded by the commission or its medical advisors, and the court is not prepared to say that the only injuries for which a claimant can ask compensation must be patent, and that any petitioner who is suffering from a nervous disorder, nervous shock, or injury to the nervous system and nerve centers, though showing no apparent injury visible to the eye, can not receive compensation at the hands of this commission, created under what is known as the workmen's compensation act.

The record does not disclose that any careful or personal examination was made of the patient on part of the commission except the X-ray examination, but the record does disclose that the reports of Dr. Hatfield, Dr. Tufts, Dr. Stoner, the dentist, and Dr. Riggs, the radiograph expert, were almost entirely disregarded.

The testimony of plaintiff's employers indicated that he was an industrious, hard-working man, who rarely, if ever, was ab-

1915.]

Francis v. Industrial Commission.

sent from his place of employment. The accident happened on the 13th day of July, 1914, and the uncontradicted testimony shows that he did not do any work of any kind until January 29, 1915, when he returned to his former employer, the Ohio Cooperage Company.

There seems to be no great difference of opinion as to the visible injuries received by the plaintiff and their extent. But, as stated above, little attention was given by the commission to the subjective symptoms complained of by plaintiff and which stand uncontradicted for the consideration of the court.

Thus, it appears that Francis was out of employment for the term of twenty-eight weeks and four days. Deducting one week, for which the commission is not responsible, leaves twenty-seven weeks and four days net loss of time, for which the court find the commission should, under all the circumstances of the case, have made an allowance under the statute. The testimony further showed that it would cost approximately the sum of \$60 to replace the broken teeth by artificial ones; that claimant incurred an expense of \$16 on account of medical services rendered by Dr. Tufts, \$40 on account of dental services of Dr. Stoner, and \$3.50 on account of medical services rendered by Dr. Hatfield. The commission, upon plaintiff's application under the workmen's compensation act, did not allow plaintiff anything for loss of time; gave him an allowance of \$40 on account of dentist's services, which was about \$60 short of the amount required to replace the teeth, and the commission further allowed \$3.50 to Dr. Hatfield, and nothing to Dr. Tufts.

There is further very positive and direct evidence before the court that none of the medical advisers of the Industrial Commission made a personal examination or diagnosis of the injured applicant. Had such an examination been made it is very doubtful if the commission would not have reached a different conclusion and made a proper allowance as provided by law.

It is the finding of the court, therefore, that the defendant commission wrongfully denied the right of May Francis, the plaintiff, to participate in this fund: that the accident did arise in the course of employment; and that substantial justice was denied the injured man by the defendant commission.

It is therefore ordered and decreed that the commission pay to the plaintiff, or his attorneys, Fulford & Shook, Cincinnati, Ohio, the sum of \$7.32 per week for each and every week beginning July 20, 1914, to January 29, 1915, in full of loss of time by reason of the injuries; the sum of \$60 additional for such dental services as the testimony shows the plaintiff is in need of; the sum of \$16 for Dr. Tufts; and the sum of \$150 for Fulford & Shook, as counsel for plaintiff, being in full of services rendered in these proceedings.

1915.]

State v. Radcliffe.

NO POWER IN A TRIAL COURT TO SUSPEND SENTENCE.

Common Pleas Court of Franklin County.

STATE OF OHIO v. JOHN RADCLIFFE.

Decided, October 9, 1915.

Clemency to Convicted Prisoners—Not Vested in the Ohio Courts—But is Conferred on Other Agencies—Judicial Power in a Criminal Case—Becomes Functus Officio After the Pronouncing of Sentence—Policy of the State Conclusively Shown by the Intermediate Law—No Common Law Jurisdiction in Criminal Cases.

1. The pronouncing of judgment in a criminal case may be delayed for a reasonable time to hear and determine a motion for a new trial, or to give the defendant time to perfect an appeal or writ of error, or for other proper causes; but in the absence of a permissive statute a trial court can not suspend indefinitely the pronouncing of sentence or the execution of judgment. *Weber v. State*, 58 Ohio State, 616, not followed.
2. The court has no inherent power to suspend sentence in a criminal case. That doctrine belongs to the common law which was never in force in Ohio on the subject of crimes and procedure. The power now given by statute to suspend sentences in certain cases is to be construed as a limitation of power as well as the conferring of power.

Robert P. Duncan and Franklin Rubrecht, for plaintiff.

Timothy S. Hogan, Ray S. Bates and C. B. Shook, contra.

KINKEAD, J.

This case was tried and determined by verdict of a jury at the April term, 1915. Defendant was found guilty of burglary. In due course a motion for a new trial was made and overruled. Thereupon sentence was pronounced, record of all of which was duly made at that term. Thereafter, at the same term, on request of counsel, the court heard argument on application for suspension of sentence. At this time, after hearing arguments, the court informally expressed the opinion that it was doubtful

if it possessed power to suspend sentence in such a case. Thereupon, by agreement of counsel, an entry was put on at the April term setting aside the order overruling the motion of new trial. It did not actually refer to that part of the entry touching the sentence of the defendant to the penitentiary. The understanding or agreement was that briefs were to be furnished on the question of power to suspend the sentence.

A formal application is made for an order suspending the sentence. In its support reliance is placed upon the decision in *Weber v. State*, 58 Ohio State, 616. In that case the defendant, under an indictment for keeping a room for gambling, was sentenced to imprisonment in the county jail for a period of 10 days, and to pay a fine of \$400, which was suspended. This was a misdemeanor.

In a *per curiam* report it was stated in the syllabus that :

"In a criminal case the court has power to suspend the execution of the sentence, in whole or in part, unless otherwise provided by statute; and has power to set aside such suspension at any time during the term of court at which sentence was passed. Whether such suspension can be set aside at a subsequent term is not decided."

The trial court in that case of its own motion at the same term at which the sentence was pronounced set the order of suspension aside, because the defendant violated its conditions.

In support of the present application, the case of *State v. Whiting*, an unreported decision, is also cited. In that case the defendant was found guilty of the crime of cutting with intent to wound, a penitentiary offense. The sentence was suspended by the trial court, and was affirmed by the Supreme Court, without report.

Decisions of courts derive their value as controlling authority from the reason and logic of the conclusion. In the *per curiam* report and the unreported decision there is nothing but the bare conclusion unsupported by any statement of the reason or grounds therefor. It is merely held that the court has inherent power to suspend a sentence *unless otherwise provided*. The unreported decision was made since the enactment of Section

1915.]

State v. Radcliffe.

13706. The inference is claimed therefrom that such power is supposed to exist in spite of the statute which regulates the conditions under which a sentence may now be suspended, and that the court must have so considered it.

My Brother Dillon of this court, in *Re Lee*, 3 N.P.(N.S.), 544, held that:

“In the absence of a statutory enactment to the contrary, the power of a court to suspend execution of sentence during good behavior, or to revoke such suspension, is not impaired or limited by the passing of the term in which the suspension was made.”

This decision was with reference to a suspension of sentence by a police court, and was entered upon the authority of *Weber v. State*, 58 O. S., 616.

There is authority in some jurisdictions which sustain the view that a judge or court, in the exercise of inherent power, may suspend a sentence. Conspicuous among the precedents on this side of the question is *People v. Court of Sessions*, 141 N. Y., 288, which asserts that the power to suspend a sentence finds its support at common law, which has been the uniform practice of the courts and is supported by numerous adjudged cases as well as by writers of acknowledged authority on criminal jurisprudence. The inherent power of the common law courts was thus relied upon though there was in that state a statute which authorized a suspension. The case can not well be regarded as an authority because of the existence of the statute, and for the further reason that the common law doctrine, whatever it was, can not have controlling effect in this state for reasons hereafter stated.

The cases of *State v. Crook*, 115 N. C., 760; *State v. Addy*, 43 N. J. L., 113, 39 Am. Rep., 547; *Gibson v. State*, 68 Miss., 241; *People v. Patrick*, 118 Cal., 332; *Ex Parte Williams*, 26 Fla., 310, and perhaps some others support the doctrine of inherent power.

The greater number of decisions in the several states do not support the rule of inherent power. One of the best considered opinions is that in *Ex parte Clendenning*, 22 Okla., 108, 132 Am. St., 628, which involved a question of power to revoke an

order of suspension, after lapse of time of sentence and after term and the right to issue commitment.

It is stated by the court that:

"Every case wherein the question is squarely presented and passed upon, *and the courts have given it the care and attention* its importance deserves, holds, practically without dissent, that in passing sentence on a person convicted of an offense the court has no power to provide that the imprisonment of the defendant shall begin at some future indefinite time, depending on the happening of an uncertain contingency; and an arrest under such conviction, made after the expiration of the term of imprisonment named in the sentence, and after the term, is illegal."

People v. Barrett, 202 Ill., 287, 95 Am. St., 230, is a recent well considered case. The power, which is universally conferred, to delay pronouncing judgment for a reasonable time, to hear and determine motions for new trial, or to give time for perfecting an appeal or writ of error, is mentioned as the only power which a court has; power to indefinitely suspend the pronouncing of sentence, or its execution is denied. To allow such a power, it is pertinently observed, would place the criminal at the caprice of the judge.

It is further said:

"that whatever the common law practice might have been, the Legislature has adopted a different method to give persons convicted of crimes the opportunity to reform, by providing a system of parole and boards to administer the same. In view of the expressed policy of the legislation of this state we are disposed to hold that the trial courts do not have the power to suspend the imposition of the sentence indefinitely after conviction, or to release the prisoner."

In *Tuttle v. Lang*, 100 Me., 123, it was remarked:

"In such case (having suspended sentence), having completed its judicial functions, it has voluntarily surrendered all further control over the case and person."

"After sentence has been pronounced in a criminal case the court can not, as a matter of leniency to the defendant, suspend

1915.]

State v. Radcliffe.

indefinitely its execution." *In Re Webb*, 89 Wis., 354; 46 Am. Rep., 846.

In 22 Okla., 108, 132 Am. St., 643, it is said:

"Were such a course permitted to trial courts, and did it receive the sanction of this court, it would make the enforcement of the law a mere farce, bring all courts in disrepute." * * *

Grundel v. People, 33 Colo., 191, 108 Am. St., 75:

"In the absence of a permissive statute, the indefinite postponement of sentence upon one convicted of crime deprives the court of jurisdiction to pronounce sentence at a subsequent term, and is, in effect, a discharge of the prisoner."

State v. Hunter, 124 Iowa, 569, 104 Am. St., 361:

"An indefinite suspension of a sentence on conditions is, in practical effect, a conditional pardon."

In *People v. Reilly*, 53 Mich., 260, it is said:

"If such power can be exercised by a judge, it incorporates into our administration of the criminal law the 'ticket-of-leave' system of the English judicature without its surveillance and checks, and places the criminal at the caprice of the judge, subject to be called up for sentence at any time. If the judge can delay the sentence one year, I do not see why he may not fifteen years."

U. S. v. Wilson, 46 Fed., 748:

"Courts have no power to suspend sentence except for short periods depending the determination of other motions, or considerations arising in the cause after verdict."

A court may delay pronouncing judgment in a criminal case for a reasonable time to hear and determine motions for new trial, etc., or to give the defendant time to perfect an appeal, or writ of error, or for other proper causes; but it can not suspend indefinitely the pronouncing of sentence or the execution of judgment. If a judge can delay the sentence one day he can de-

lay it for any length of time. *People v. Barrett*, 202 Ill., 287, 96 Am. St., 230.

"The authority to wholly relieve parties from a conviction for crime is not given to the courts but belongs to the pardoning power." *People v. Blackburn*, 6 Utah, 347; *People v. Brown*, 54 Mich., 15.

The power to indefinitely postpone the punishment prescribed by law by suspending the execution of a sentence is the power to perpetually prevent punishment, a power which, under provisions of the Constitution, does not exist in the courts. *Neal v. State*, 104 Ga., 509, 69 Am. St., 175; *Miller v. Evans*, 115 Iowa, 101, 91 Am. St., 43.

The case of *Commonwealth v. Mayloy*, 57 Pa. St., 291, is instructive in that it makes clear the essential distinction between the inherent power of the common law courts to suspend a sentence and the power of our state courts in the matter. The material difference between the power of common law courts, and that of our courts is made clear. The difference in the practice is shown to demonstrate how improbable it is that our courts should possess such inherent power. The argument is "that after the judgment or sentence is pronounced, which is but the judgment of the law, was intended, and ought to be final so far as the courts are concerned, with the execution of the sentence which follows, courts have nothing to do, nor ought they."

We have reviewed some of the authorities bearing on the question. The suggestions contained in views expressed shows that the trend of opinion and better reason is against the exercise of such power. It seems entirely clear that basic reasons underlying the common law rule are inapplicable to the conditions under the Constitution and statutes touching judicial jurisdiction and power in criminal cases. Common law doctrines may be adopted and applied only when conditions so warrant, and not where the whole plan of criminal procedure, jurisdiction and judicial power has been constructed on a wholly new basis. Courts must be cautious as well as zealous in the exercise of

1915.]

State v. Radcliffe.

power. The function of mercy, clemency, parole, probation or suspension has been carefully designed to be placed in hands of other officials than the courts. It is true that nothing specially is said about the question of inherent power. Nothing, it seems, can more effectually demonstrate the want of such power than our Constitution and statutes.

This brings us to the precise point of distinction between the common law jurisdiction over crimes and the constitutional and statutory jurisdiction of our state.

The Constitution creates *judicial power*, but does not prescribe any jurisdiction in criminal matters. There can be no judicial power without jurisdiction. If the jurisdiction prescribed by statute excludes all judicial power exercised by the judiciary in criminal cases, how can any inherent power be exercised in disregard of statutory penalty, and regulations concerning the assessment thereof? Article IV, Section 1, of the Constitution, vests judicial power in the several courts, embracing the court of common pleas, the one possessing original jurisdiction in criminal cases. Article IV, Section 4, of that instrument also provided that: "The jurisdiction of the court of common pleas and of the judges thereof shall be fixed by law."

No jurisdiction whatever is conferred on the common pleas court by the Constitution in criminal cases, and it can exercise none until conferred by law—by statute. *Stevens v. State*, 3 O. S., 453; *Allen v. Smith*, 84 O. S., 283.

In deciding the question whether the court has inherent power to suspend sentence, the distinction between the judicial power and jurisdiction should be kept in mind. Judicial power of necessity can be exercised within the scope of jurisdiction and not beyond it.

A comparison of judicial power as exercised within the scope of the statutory jurisdiction in criminal cases with that exercised in civil cases will clearly illustrate the distinction sought to be made. It will show how such power in civil matters is exercised according to the course of the common law, whereas in criminal cases it is to be exercised without regard to the common law,

but strictly in accord with the provisions of the statutes. Having no judicial power in the latter class of statutes except as derived by statutes, courts can not exercise any power derived from any other source. Common law crimes and procedure have been abrogated, which takes away all judicial power heretofore existing at common law, not specially provided for by statute. Judicial power in civil cases is largely dependent upon the common law, while in criminal cases it is not governed by the common law at all.

Jurisdiction in civil cases is conferred in part by Constitution and in part by statute. Section 11215 of the code provides that this court "shall have original jurisdiction in all civil cases where the sum or matter in dispute exceeds the original jurisdiction of justices of the peace."

From the nature of things civil jurisdiction could not be particularly stipulated or prescribed for as is done in criminal cases. By general understanding in the adoption of our Constitution and Civil Code of Procedure, jurisdiction in civil cases is to be exercised according to the course of the common law. In rendering judgment in such cases, the court is to be controlled by the common law; within the limits of procedural limitations as to terms and other matters it may modify, change or set aside its judgment once rendered. That is, in concluding upon what judgment is to be given the court exercises the inherent judicial power of the common law courts, unrestrained by any limitations prescribed by statute, except such as may relate to formal matters not having any relation to the substance of judicial power.

In criminal jurisdiction we have never had any common law crimes nor any common law jurisdiction. This everybody knows to be axiomatic. The judgment of the court, in each case of conviction by verdict or plea of guilty, is fixed by positive and irrevocable provisions of statute. The so-called inherent power of the common law courts has nothing whatever to do with it. The court has no will or wish, and no discretion in respect to whether a sentence shall or shall not be pronounced, or whether it shall or shall not be enforced.

1915.]

State v. Radcliffe.

When the judicial sentence is pronounced by the court, the judicial power becomes *functus officio*, and all that must thereafter be done or that may be done is prescribed by positive provision of statute. Strict construction of criminal statutes excludes the exercise of any power not therein expressly provided for. When the sentence is entered the prisoner must be disposed of as the statutes provide. To permit the court to qualify its order of sentence by conditions not authorized by statute, would result in disregard of the acts of the Legislature. When a sentence is pronounced jurisdiction ceases, unless the case be one within the statute authorizing a suspension.

To permit the judicial power to suspend a judgment required to be rendered by the mandatory provision of the statute would be to override the power of a co-ordinate branch of government which is vested with exclusive power to fix the jurisdiction and power of courts. It will permit a judge to substitute its judgment or caprice for the legislative function.

To sustain an inherent power of courts to suspend a sentence mandatorily required by statute would be an assumption of power, pure and simple. Criminal penalties as prescribed by statute represent the preponderant public opinion, as expressed by the Legislature, which can not be disregarded or modified by the judiciary, no matter how high and lofty its motive may be in any particular case where there is an inclination to suspend a sentence.

As before stated, the power of this court in civil matters is inherent in it as a common law court, to be exercised according to the common law doctrines. Its power to decide and adjudge on the merits of a case is not prescribed by constitution and statute. Its final judgment is controlled or governed by common law doctrines and rules which are not express in the sense that a penalty of a criminal statute is.

In other words, the judgment to be rendered in the civil case may, in a sense, constitute the individual judgment of the court, without control of specific requirement or limitation.

But the judgment and sentence in the criminal case is not the individual opinion or judgment of the judge or court, but is

that of the Legislature. Before the indeterminate and probation or suspension statutes, the judge or court had no discretion whatever, and was required to impose a sentence between the minimum or maximum penalty. Before the indeterminate statute, the court was bound to pronounce sentence within the statutes, the minimum or maximum term, or a term between the two. The enactment of the indeterminate law furnishes conclusive evidence that it was never intended that the court was to exercise clemency. Under these statutes the duty of sentencing according to their provisions is mandatory, the only discretion the court has being to suspend a sentence when conditions warrant it according to conditions fixed by statute.

Under Section 13706, General Code, the court has discretionary power to suspend the execution of a sentence, and to place the defendant on probation when "the defendant has never before been imprisoned for crime."

What would be the use of enacting such a statute if it was settled that courts had inherent power to suspend a sentence, the terms of which are prescribed by statute. If a court could prescribe the conditions of the order of suspension, why the necessity of detailed provision as to the conditions of suspension and of the regulation of those so placed on probation?

All these statutes and the whole criminal code, as well as the difference between judicial power in criminal and civil cases, in no uncertain language expressly and inferentially, demonstrate, in my judgment, the utter want of the inherent power of suspension.

Such inherent power as it is conceded courts have—as in contempt and disbarment—bear no analogy to the claim of inherent power asserted in this case. Such power exists only for the purpose of maintaining the dignity and power of the judiciary.

There were cogent reasons for sustaining the inherent power of common law courts to suspend sentence. The practice had its origin in the hardships resulting from "hard and fast" rules of procedure, under which there was no power to grant a new trial and when the verdict could not be reviewed by a higher court, and where it was doubtful whether the accused could have

1915.]

State v. Radcliffe.

the benefit of clergy. Arbitrary reprieves were granted in such cases, and in certain cases where youths were convicted of their first offense, the power belonging to every tribunal invested with authority to award execution in a criminal case. *Hale P. C.*, ch. 58, p. 412, 1 *Chitty Cr. L.* (1st Ed.), 617, 758.

Under our statutes the court is given power to pronounce sentence and to suspend in cases where there has been no previous conviction and imprisonment. The power to grant reprieve or pardon, however, is invested in the executive exclusively.

However so much some opinions may endeavor to distinguish a suspension of sentence from a pardon, the stubborn fact remains that a suspension of sentence upon certain conditions operates as a release from imprisonment. It is said that "the suspension of the sentence simply postpones the judgment of the court temporarily or indefinitely, but the conviction, etc., remain and become operative when judgment is rendered, "while pardon blots out of existence the guilt." *People v. Court*, 141 N. Y., 288.

The majority opinion is to the contrary, that the suspension without authority is in effect a full release, because if there is no power to suspend, there can be no subsequent power to vacate the suspension and enforce the penalty.

The view taken by the court in *People v. Barrett*, *supra*, aptly expresses the situation in this state. The state had adopted a different method from that of the common law to give persons convicted of crime the opportunity to reform, by providing a system of parol, and boards to administer the same, as well as of pardons, and suspension and probation.

There is good and sufficient reason for not regarding *Weber v. State*, *supra*, as authority. Section 13706 of the code specially provides the only condition under which a sentence can be suspended. It operates both as a grant and limitation of the power of suspension. A sentence may only be suspended in accord therewith.

I suppose it will have to be admitted that the conclusions of the court in *State v. Whiting* are not in accord with those contained in this opinion. My experience in following decisions in unreported cases has not been very satisfactory. So in

this case I chose not to regard *State v. Whiting* as an authority. No one ever knows why an unreported decision is made. The court might have considered that it would have been futile to reverse the lower court because the prisoner had been turned loose in contravention of statute and there was no power to re-commit him. That was the effect of the act of the trial judge, in my opinion, and such is the rule of decision in other states. That was true because the judicial act became *functus officio*. The doctrine of *Weber v. State* could no longer be relied upon because the statute had otherwise provided that a sentence could only be suspended in case the accused had not previously been imprisoned.

I have thought it unnecessary to consider in detail the several statutes relative to the penalty to be assessed for each crime, to show the mandatory character therefor. It is important, however, to specially note the provisions of Section 1364 of the Criminal Code. This provides that the court must inform the defendant of the verdict and to ask if he has anything to say why judgment of sentence shall not be pronounced against him. It requires also, if the answer is in the negative, that "the court shall pronounce the judgment *provided by law*."

It is difficult to perceive, therefore, how a court, by the exercise of power conferred by neither the statute nor the Constitution, and as part of the sentence of the judgment *required by law*, can impose conditions of suspension in derogation of the statutes relative to probation, such as was done in *State v. Whiting*, the unreported decision. In that case the court imposed terms of probation entirely contrary to the statutory provisions contained in Sections 13, 709-13, 715, which provide for a complete system of probation by the present state board of administration. The order that was made in *State v. Whiting, supra*, took the matter out of the hands of the state officials, with whom the Legislature had entrusted the province and duty with respect to probation.

It is also pertinent to refer to the provisions of Section 2210 of the statutes, which provide that the effect of an order of suspension of sentence is to place the defendant on probation, under

1915.]

State v. Radcliffe.

control of the board of managers of the institution. How, then, can a court suspend a sentence upon such conditions as are named in *State v. Whiting, supra*, which is in derogation of the terms and conditions of the section referred to?

My conclusion is that the court has no statutory or inherent power to suspend the sentence in this case.

At the time of the conviction of defendant I was inclined to suspend the sentence if it could be legally done, because he was under the influence of liquor. On maturer consideration, however, the story of the defendant appears so unreasonable as not to be worthy of belief. If he had been innocent he would not have fought the policeman as he did. An innocent man would have acted differently, it would seem, in reliance upon the pendency of innocence. I do not believe the officer would have made a wanton attack on the defendant nor do I believe that he did violence to the prisoner until the latter made it necessary.

The court declines to suspend sentence, both because it has no power, and for the further reason that it would injure the cause of justice to do so.

The former order vacating the overruling of the motion for a new trial having been made at the preceding term, an order may now be made overruling the motion, and the defendant is sentenced to an indeterminate term in the Ohio Penitentiary.

APPEAL FROM AN ORDER TERMINATING A GUARDIANSHIP.

Common Pleas Court of Knox County.

IN THE MATTER OF THE TERMINATION OF THE GUARDIANSHIP OF
CHARITY ANN ROBINSON.*

Decided, July 7, 1915.

Guardian and Ward—Bond Required on Appeal from an Order Terminating Guardianship—Section 11209.

An appeal by a guardian from a judgment terminating the guardianship is not in the interest of the trust and requires that the appeal be perfected by the filing of a bond within twenty days.

R. L. Carr and Lott Stillwell, for the plaintiff.

Rawlins & Crouch and F. O. Levering, contra.

FULTON, J.

William H. Wagner was appointed by the Probate Court of Knox County, Ohio, guardian of Charity Ann Robinson, and on the 9th day of February, 1915, a motion was filed in said probate court that the guardianship be terminated, and that she, Charity Ann Robinson, be restored to all things lost by reason of said guardianship. This motion was set down for hearing several times and was finally heard by the court on the 15th day of March, 1915, at which time, the court, after a full hearing of the matter, and argument of counsel, made the following order:

"It is hereby directed that the guardianship as to her (Charity Ann Robinson), heretofore granted by this court, terminate and William H. Wagner, guardian, is ordered to file a full account of his administration of said trust."

On April 2, 1915, William H. Wagner filed a written notice of his intention to appeal to the Court of Common Pleas of Knox County, Ohio, from the decision of the Probate Court of Knox County, Ohio, terminating the guardianship of Charity Ann Robinson, and the probate court certified to the Court of

* Motion for order directing Court of Appeals of Knox County to certify its record overruled by the Supreme Court December 7, 1915.

1915.]

Guardianship of Robinson.

Common Pleas of Knox County, Ohio, the doings of said probate court in regard to said matter, being a complete transcript of the same. On April 15, 1915, a motion was filed in the common pleas court by Charity Ann Robinson to dismiss the appeal for two reason:

First. That the probate court has final jurisdiction in the termination of guardianship, and therefore this cause is not appealable.

Second. If this cause is appealable, then this appeal has not been perfected as provided by statute, in that no bond has been filed by the appellant within the time provided by law, and this case is not one that is in the interest of the trust and therefore does not come under Section 11209 of the General Code of Ohio.

The motion to dismiss this appeal upon the grounds stated therein was heard by this court. The question presented by this motion is as to whether or not, under the facts and circumstances in this case, it is necessary for William H. Wagner, in order to perfect his appeal, to file an appeal bond. The first branch of the motion the court does not consider because the court does not think that that branch of the motion is well taken. Coming to the second branch of the motion, to-wit: that it is necessary for William H. Wagner, in order to perfect this appeal, to file an appeal bond within twenty days, as required by Section 11209 of the General Code of Ohio, it is contended by the parties to the motion that this bond is required because this appeal is not in the interest of the trust. Section 11209 reads as follows:

“When an appellant from an order, judgment, or decree, in or by any state court or tribunal is a party in a fiduciary capacity in which he has given bond in Ohio for the faithful discharge of his duties, appeals in the interest of his trust, upon written notice to the court, within the time limited for giving bond, of intention to appeal, it shall be allowed without bond.”

What was the position of William H. Wagner after the probate court, on the 15th day of March, 1915, made an order terminating the guardianship? Was he from that time on acting in a fiduciary capacity, and was he from that time on in any

way or in any manner guardian of Charity Ann Robinson? As far as the probate court was able, it had dissolved the relation of guardian and ward, and from the 15th day of March and forward the said William H. Wagner was not guardian of Charity Ann Robinson, but that relation had been severed by the probate court, and William H. Wagner sustained no relation towards Charity Ann Robinson excepting that of a private individual. This court thinks he was not from that time on acting in a fiduciary capacity.

The court has examined the several cases which have been cited, to-wit: the case decided by Judge Washburn in 4 N.P.(N. S.), 449; and the cases cited in the Pacific Reporter, to-wit: 36 Pac. Rep., 1059; 52 Pac. Rep., 68; 26 Pac. Rep., 505; and the 89 Pac. Rep., page 540, and the holding in each of these cases is that when an order is made terminating the guardianship by the probate court, and the person who has been guardian attempts to appeal, his appeal is not in a fiduciary capacity, and is not in the interest of the trust, but is a personal matter of his own, and, for that reason, in order that he might perfect his appeal, it is necessary for him to give a bond as required by the statute when he is not acting in a fiduciary capacity.

It is, therefore, the opinion of the court that the motion is well taken, and the appeal may be dismissed at the costs of William H. Wagner.

1915.]

Railway v. Railway.

**RIGHTS AS BETWEEN STEAM AND ELECTRIC RAILWAYS IN
OVERHEAD CROSSINGS.**

Common Pleas Court of Franklin County.

**NORFOLK & WESTERN RAILWAY CO. v. THE COLUMBUS, NEWARK
& ZANESVILLE ELECTRIC RAILWAY COMPANY ET AL.**

Decided, November 20, 1915.

Tracks and Crossings—Proceedings for Removal of an Electric Overhead Crossing—Where in the Way of Elimination of a Steam Railroad Grade Crossing—Rights at a Crossing of the Successor of the Company Building the Line—Power of Railway Companies to Agree as to Crossings Subservient to the Public Interest.

A petition by a steam railway company praying for an injunction compelling an interurban company to remove an overhead crossing, which interferes with the grade crossing elimination work of the steam road, or that acting under the provisions of Section 8834, General Code, the court should fix by its decree the mode of such crossing and equitably apportion both the initial expense and the cost of maintenance, is good against demurrer.

H. J. Booth and Henry Bannon, for Norfolk & Western Railway Co.

Webber, McCoy & Jones and Paul Martin, for defendant railway companies.

Henry L. Scarlett and Wilbur E. Benoy, for the city of Columbus.

DILLON, J.

Counsel having requested that the court give a speedy decision upon the demurrer to the petition, the court has this day taken up the demurrer and has decided that the same should be overruled. The court can not go into any elaborate discussion of the very many questions presented, and indeed some parts of the opinion itself may be considered *obiter*, as to which more thorough and mature consideration may still be had.

The agreement for the crossing, made December 16, 1901, between the plaintiff and the Columbus, Buckeye Lake & Newark

Traction Company, was in writing, although the same was not witnessed or acknowledged, nor did the grant mention that it was for the benefit of the traction company's successors or assigns. The claim is made that the present operating company, the Ohio Electric Railway Company, possesses no rights under that contract. I am clearly of the opinion that this claim is not well founded. It must be remembered that there was a right existing on the part of the original traction company to cross the tracks of the plaintiff, and this right exists for all time. If the two companies were unable to agree, the law provides the method for determining the manner and the terms upon which said crossing should be made. The parties indeed need not have put their agreement in writing, so far as the validity of the agreement was concerned.

The right of a railroad corporation to sell or lease its property and to include therein every right and franchise which it possesses is too well established to need discussion here. Therefore, so far as this case is concerned, we must treat the present company exactly the same as if this controversy were between the plaintiff and the original traction company, the Columbus, Buckeye Lake & Newark Traction Company. It is for this very reason that the traction company has this right by law to cross the plaintiff's tracks, that the defendant's contention that the plaintiff's remedy is ejectment can not avail. The plaintiff can not eject the defendant traction company. It can only have a controversy with it in regard to the manner of crossing and exercising the right to cross. Therefore, I have deemed it unnecessary to go into a discussion of the rights growing out of an easement or a license, or to determine into which of these two classes the defendant's rights fall. Manifestly, we can not say that it is an easement in the sense that that term is used with respect to real estate, nor is it a license in the sense that it is simply an authority to go over the tracks, revocable at the will of the plaintiff. The plaintiff has no power to revoke the right of the defendants to go over its tracks. These common law distinctions are sometimes subtle, but in the face of our statute it would only lead here to useless quibble.

1915.]

Railway v. Railway.

It is argued by the defendants, commencing at page 28 of the opening brief, that the grant of a mandatory injunction would deprive the defendant companies of their property without due process of law, and for such appropriation there must be a compensation, and likewise the defendants would be entitled to the right of trial by jury. This feature of the case has not yet been reached. Of course, the plaintiff, under the statute, has a right to pray for whatever it believes it is to be entitled to, but I am deciding this demurrer upon the theory that the plaintiff and the defendant traction company are unable to agree, and that that part of the prayer which asks in the alternative that the court exercise the powers conferred upon it by statute, and for general relief, is the vital part of the prayer. If at any time in the future a court should attempt to exercise unlawful power by appropriation, it will be time then for the defendants to raise this question.

It is further claimed by the defendants that the petition fails to show that the plaintiff had submitted plans, etc., to the state railroad commission as required by Section 8905 of the Revised Statutes. This section in its concluding paragraph provides that should a railroad company or its assigns hereafter raise the grade of its tracks under any of "such structures" * * *, the company shall pay all costs and damages thereby made necessary. There are two reasons, therefore, why this contention will not obtain. First, it simply provides for paying "costs and damages," and, secondly, I am of opinion that the expression "such structures" refers to the preceding section, 8903, and that said last named section, in my opinion, does not embrace the overhead structure involved here.

Probably the crux of the defendants' position is to be determined by a construction of Sections 8834 and 8835. It is claimed by the defendants that Section 8834 can apply only to the initial crossing, and after that has been once established, either by agreement or by decree of court, further power to act under this section is lost. I have given this section some considerable study, and I am unable to apply this strained interpretation of the statute, nor can I see any reason why, from a reading of the

statute, any such intention can be gathered. It would put two railroads in this situation: that, once having established their crossing, and the manner thereof, it would matter not what exigencies might in the future arise, or what changes might take place, they are each in a straight jacket, and therefore the public at large, as well as the companies themselves, are forever bound. It would leave the statute inoperative in the event of any sudden avulsion of nature in whatever form it might come, or of other situations whereby the entire ground would be so destroyed or removed that the tracks could not possibly exist at the same place they are now located, nor could the crossing be in the same place or in the same manner. Indeed, this very crossing is situated near a stream of water which by flood might cause such a condition as to make a change necessary. The plaintiff company is just in that situation today. By virtue of Section 8874 the city had a right to compel the plaintiff company to raise its tracks, and by virtue of Section 8863 the right is given the city and the railroad company to agree, rather than to have a lawsuit over the subject-matter. The plaintiff, therefore, is not to be penalized by having done that which the law encourages, to-wit, agree with the city rather than to have a lawsuit, and therefore I hold that its rights, so far as the defendant companies are concerned, are just as strong by virtue of its agreement under Section 8863 as if it were before the court here under Section 8874, having been compelled by the city to raise its tracks.

There has been a little argument made, that the parties have made an agreement which is now binding, and therefore the public at large is helpless, and the statute inoperative. I do not think this contention can be seriously urged. The power of railroad companies to agree with each other is still subservient to public interests, and they can not by agreement override the public necessities by any such private agreement. The language used in the case of *The L. & N. E. R. R. Co. v. Delaware & Lackawanna*, 240 Pa., 401, is most pertinent here.

An entry may be drawn accordingly.

1915.]

Perry v. Edwards Manufacturing Co.

**A WORD AS TO THE WEAKNESS OF THE PRESENT
JURY SYSTEM.**

Superior Court of Cincinnati.

HENRY PERRY V. EDWARDS MANUFACTURING CO.

Decided, December 14, 1915.

*Misconduct—On the Part of a Jury Deliberating on a Case—Not Shown
by Discussion of Defendant's Ability to Pay—Some of the Trials of
a Trial Judge.*

It is not misconduct justifying a new trial for a jury, while deliberating upon a case, to discuss the defendant's ability to pay the amount of its verdict. And when, upon a second trial of a case, a second verdict for the plaintiff has been returned, it will not be set aside merely because the court is of a contrary opinion, when there is testimony to support it and it is not inconsistent with the charge of the court.

Thomas L. Michie, for plaintiff.

Aaron A. Ferris and *Thos. H. Morrow*, contra.

OPPENHEIMER, J.

Memorandum on motion for new trial.

This case was once before tried in this court, and a verdict for the plaintiff returned. On May 28th last the court of appeals reversed the case and remanded it for a new trial because of error in the charge of the court. 22 C.C.(N.S.), 422. Plaintiff had executed a release to the defendant, which he sought to set aside upon the ground that it had been obtained by fraud and misrepresentation. The court charged that the presumption of truth which followed the written release might be overcome by a preponderance of the evidence. It is held that this was error, and that for the purpose of avoiding such release clear and convincing proof must be adduced. The case was again tried, and the court was careful to frame its charge in accordance with the view expressed by the court of appeals. A second verdict for the plaintiff was returned, and counsel now seeks to have it set aside upon ten distinct grounds. Nine of these grounds are simi-

lar to those which were urged on the first trial of the case, and as they were not in any way touched upon by the court of appeals, we are justified in assuming that this court, as to these matters, was not in error. We therefore pass them by without comment.

But counsel for defendant now urge, in addition to the causes previously alleged, that the jury was guilty of gross misconduct. They state that one of the jurors, after the case had been terminated, informed them that during the discussion of the case in the jury room, it was suggested that defendant could readily pay the amount of the verdict out of its earnings for one week, as was indicated by a statement which had recently appeared in the newspapers to the effect that it had declined to accept a war order for a million dollars. Counsel seem to be much astonished at the fact that such considerations can possibly enter into the minds of jurors who are sworn to decide the case solely according to the evidence which is introduced in the course of the trial, and the law as it is interpreted by the court.

Strange as it may seem, we can not share counsel's astonishment or indignation. Indeed, an experience of three years upon the bench has perceptibly diminished our reverence for that ancient institution, the jury. We have reached the point where we should be astonished by nothing short of a jury which conforms with counsel's ideal. The truth of the matter is that we have long permitted ourselves to be misled by such pompous, high-sounding phrases as "the sanctity of the jury system" and "the inviolability of the right of trial by jury." We have made the jury the subject of much extravagant panegyric, and have even found evidence of its sacred character in Holy Writ, pointing with reverential awe to the twelve apostles, twelve tribes, twelve stones, etc. We have forgotten some of the circumstances and conditions which called the jury into existence, and have proceeded upon an assumption that its antiquity has placed it beyond reproach. The world moves on apace; systems of government change; industrial relationships grow more complex; legal principles are modified to meet altered economic and social conditions, but our jury system goes forever on in all its pristine simplicity and with all its inherent defects.

1915.]

Perry v. Edwards Manufacturing Co.

In the days when judges were appointed by irresponsible tyrants who were naturally covetous of the possessions of their subjects, a jury of men who were totally free from control was, of course, a necessary safeguard of life and property. When the founders of our country severed their relationship with England, they, with recent evidences of judicial tyranny before them, threw about the jury every possible precaution against extraneous influence. They made the judge "a mere functionary to preserve order and lend ceremonial dignity to the proceedings," instead of "the directing and controlling mind at the trial." They deprived him of practically all power on the administrative side of legal procedure, while in his judicial capacity they demanded of him a divine perfection to which mere human beings can not even approximate.

But times have changed. Our government is, at least in theory, now under the control of the people, and our judges, whether elected directly by the people, or appointed by their agents, must be supposed to represent the people. And so the need for the jury as a political weapon of defense has now disappeared. However, we still temporarily call together from their ordinary avocations twelve men who are totally untrained in their new duties, and then deprive them of the counsel, advice and assistance of the only presumably trained and impartial mind in the court room. We reduce the judge to a mere figure-head or referee in a contest between two forensic gladiators. He must sit silent, unless a breach of the peace is threatened, when he is permitted gently to admonish counsel to be reasonable—but with due care lest his remarks may prejudice the jury against either of the offenders. Meanwhile, he must rule upon all disputed questions of law without opportunity for investigation or thought, and he must rule correctly under penalty of reversal by a court which has ample opportunity to study the questions upon which he has passed. The jury may guess wrongly without fear of consequences. It may err egregiously in its understanding or construction of the evidence—and no one may question its judgment. But "in every sound which the judge utters there lurks the possibility of reversible error." Almost every question which is propounded to him in the course of the trial re-

lates directly or indirectly to the evidence; and yet if he even suggests to the jury the impression which such evidence makes upon his own mind, or gives a reason for his ruling which may reveal an opinion, he is in danger of nullifying the entire proceedings. Until we make it possible for a judge to assist the jury in arriving at an intelligent understanding of the facts, we can not hope for relief from the present evils of the jury system. This we may do by permitting him to give the jury the benefit of his experience and skill in handling evidence and in determining its weight and effect. No obligatory instructions on the facts need be given, for this would of course eliminate the jury; but advice should be given them in necessary cases. And this advice may and doubtless will be disregarded whenever it is apparently unsound. In England this method is followed, and no one now questions its propriety or expediency.

We are by no means alone in our criticism of the jury system. Trial judges and lawyers of large experience are constantly raising their voices against the frequent miscarriages of justice which attend present methods. Yet our only available remedy is to set aside verdicts where some rule of law has been flagrantly violated, and to re-submit cases to new juries which are as likely to err as their predecessors. Of course this entails endless delays and the expenditure of large sums of money; but we are so prodigal of time and wasteful of money that we do not seem to regard these circumstances at all.

We have borrowed our jury system from England. In the federal courts the reforms so successfully adopted in England have been largely followed; but in our state courts, we cling to the ancient forms which make our modern cry for "substantial justice" a mere mockery—a siren's song wherewith to lull the easily satisfied to sleep. And the worst part of it all is that the limitation is self-imposed. There is nothing in our Constitution and nothing in our statutes to require a continuance of this evil. The rule is simply "judge-made" law; but so long as appellate courts insist, as did the court in the case of *Hazen v. Morrison & Snodgrass Co.*, 14 C.C.(N.S.), 483, that where "remarks" made by a trial judge "exhibit an opinion on the part of the judge as to the credibility of witnesses or an opinion on his

1915.]

Perry v. Edwards Manufacturing Co.

part as to the facts in the case, prejudicial error results and a reversal becomes necessary," trial judges will be bound to pursue the even tenor of their ineffective way.

Under the present system, every possible opportunity is given for the manifestation of those human prejudices, frailties and idiosyncracies which are possessed by the average jury. A jury is simply an aggregation of twelve human beings. It is usually sympathetic. Its composite heart goes out to the weak and helpless. It would exercise charity toward those who, in the struggle for existence, have met with disaster—especially when it can do so with funds furnished by others. And when an injured and indigent workman is placed in juxtaposition with a prosperous corporation, it can not refrain from making invidious comparisons. It would not knowingly or wilfully violate an oath or disregard instructions of the court upon any questions of law; but perhaps it has not understood those instructions—indeed, the court itself may not have understood them. And so, having no assistance from the court in its consideration of the evidence, its sympathies are given full play so long as the results which it reaches are consistent with the charge as their untrained minds have interpreted it.

Perhaps some day we shall go even a step farther, and adopt the plan, so successfully tried in New York, of a court of special sessions, consisting of several judges who pass upon questions of both law and fact; or we shall try questions of fact before adequately compensated commissioners who are made to appreciate their duties and responsibilities, who are selected in some measure because of their fitness, and who will not be disqualified to act merely because they are acquainted with the milkman who serves the plaintiff or with the barber who shaves the defendant. We shall not spend much valuable time and large sums of money (furnished, of course, by the long-suffering tax-payers) in the selection of a jury, only to find that its sole qualification when it has been accepted is that its members do not read newspapers and have not as yet learned of the termination of the Civil War.

We are unable to see the present case as the jury has seen it. The verdict is necessarily based upon the assumption that all witnesses, with the exception of the plaintiff himself, are wilful

perjurers, or at least that they are wonderfully economical of the truth. (And it may be parenthetically remarked that the plaintiff is the only *interested witness*, because defendant is amply protected by a policy of insurance.) But the jury had the right to take that view of the case, and as we are only judges of law, and not of facts, we are bound by the verdict.

We are therefore constrained, with profound regret, to overrule the motion for a new trial. Our only consolation is that two barristers of large experience and excellent reputation have suddenly discovered the inherent weakness of our jury system.

**INVALID GUARANTY OF BONDS BY AN INTERURBAN
RAILWAY COMPANY.**

Common Pleas Court of Franklin County.

THE TROY TRUST COMPANY V. THE C., D. & M. RAILWAY CO.

Decided, November 10, 1915.

Interurban Railways—Without Authority to Guarantee the Bonds of Another Company of the Same Class—Consent of Stockholders Does Not Validate Such a Guaranty, When—Refusal to Permit Suit Against a Receiver Upon Such a Guaranty.

1. The statute permitting steam and commercial railroads to give assistance to other like companies, in the form of a guaranty or otherwise, has no application to interurban railways, and it follows that where such a road is in the hands of a receiver the court can not permit a claim based on a guaranty which is *ultra vires* to be asserted against it.
2. A contract of absolute guaranty made by an interurban corporation to pay an issue of bonds of another interurban corporation for the purpose of constructing a line of railway which is not expressly authorized by its charter is *ultra vires*. Such corporation can not undertake to make such guaranty under the guise of an incidental power to sell power, can not undertake to carry out a distinct and independent purpose contrary to its granted power.
3. A showing that such a contract of guaranty was assented to by the stockholders can be of no avail, where it appears that both companies were dominated by one man through ownership of stock

1915.]

Troy Trust Co. v. Railway.

and that the bonds upon which the guaranty was given were sold by this man in order to reimburse himself for money used in construction.

W. Z. Davis, for plaintiff.

H. F. West, contra.

KINKEAD, J.

This action is brought by plaintiff on a written guaranty of bonds made by officers of the defendant company.

The defendant company owned a line of electric railway running from Columbus, Franklin county, to Marion, Marion county, Ohio. The Columbus, Marion & Bucyrus Railroad Co. was a corporation organized to operate a line of railway from Marion to Bucyrus, Ohio. The Marion & Bucyrus Company executed a mortgage to secure an issue of bonds in the sum of \$500,000. The defendant company entered into a contract August 1, 1905, with the C., M. & B. R. R. Co. by which it agreed to guarantee the payment of the principal and interest of \$500,000 which sum was to be borrowed to provide funds with which to build and construct its line of railway. The contract between the two companies provided for the making of certain traffic arrangements, and for the sale of power by the defendant company when the line of the C., M. & B. R. R. was built. The liability assumed by the defendant company was to pay the principal of the \$500,000 of bonds and interest in case of default. It was thus a liability of \$500,000.

There was default, and on foreclosure of the mortgage bonds, there was left due and unpaid the sum of \$598,146.31, recovery of which is now sought in this action.

The Marion & Bucyrus road was constructed by John G. Webb under a contract by which he received all the stock of the corporation and all the bonds issued by it. He paid the interest on the bonds up to and including March 1, 1909, the corporation not paying any portion. The railroad property was never turned over to the corporation by Webb as contractor, a receiver having been appointed who took charge of it in the name and for the corporation who afterwards sold the road.

The C., D. & M. Railway Co. received nothing on account of the bonds, and no payment, even for current, was ever made by the Marion & Bucyrus Road to the defendant company.

John G. Webb owned substantially all of the stock of both corporations. It was turned over to him under a contract to build the road. John G. Webb was president, stockholder and director of both companies, and was the contractor to build the road.

The C., M. & B. Railroad Co., it seems from the facts submitted, never did any business, either in the construction of its road, or in its operation, except to execute a mortgage and issue bonds, and place them in the hands of John G. Webb for disposition and sale to raise money. John G. Webb had absolute control over every act, both that of the C., D. & M. Railway in guaranteeing the bonds, as well as the disposition of the bond and the cash derived therefrom.

John G. Webb individually did whatever business was done in running the road after the line was constructed, before a receiver was appointed.

Plaintiff does not have the right to institute or maintain this action against the defendant without having first obtained leave of this court. No such leave or authority has been obtained.

The Columbus, Delaware & Marion Railway was a corporation organized to be located at Columbus, Franklin county, Ohio, and its principal business there to be transacted.

Summons was issued commanding the sheriff to notify "H. G. Catrow, as president of the Columbus, Delaware & Marion Railway Company."

Summons was served on the president of the corporation by the sheriff of Montgomery county, Ohio.

Under the statute, Section 11273, an action against a transportation company owning or operating an electric traction road, may be brought in any county through or into which such electric traction road passes or extends.

Advantage may be taken of this statute only when such transportation company is itself operating its electric traction road. Being in the hands of a receiver at the time this action was filed,

1915.]

Troy Trust Co. v. Railway.

no suit could be brought against the corporation, or its receiver without leave. The action was commenced August 14, 1914. Section 9065, authorizing suit to be brought against a receiver of an electric road without leave was passed, in its amended form, April 6, 1915.

A jury is waived and the case is submitted upon an agreed statement of facts.

The defendant company is and has been in the hands of a receiver since August 5, 1909. It is totally insolvent and is in process of liquidation, and all persons were enjoined from prosecuting any action against the defendant without leave of court, and no such leave was given plaintiff to bring this action. Therefore it is claimed that this court has no jurisdiction over this case.

Inasmuch as plaintiff has waived a jury and submitted its claim to the decision of the court, and all of the essential facts being before the court—the whole question, that pertaining to the right of plaintiff to sue the defendant corporation at all, as well as the merits of its claim—the court may make full disposition of all the questions involved.

The court having charge of this trust, can not permit this case of plaintiff to proceed, even to judgment. Even if the right of plaintiff to a judgment was clear, the case being submitted as it is to the court, with the facts in the record as to the total insolvency of defendant and the receivership, the court is justified in considering whether the claim if it has merit and validity may be asserted against the receivership.

The rules concerning the discretionary power of the court to permit suit to be brought against a receiver is discussed by this court in *Dorr Run Coal Co. v. Nelsonville Coal Co.*, 11 N.P.(N. S.), 38. In cases at law the court has little discretion, perhaps none, to pass upon the merits of the claim. In cases of equity it is entirely within the discretion of the court to grant application to bring an independent action against its receiver, or to compel the application to intervene in the original case.

The court may now proceed to state reasons why it can not allow judgment to be entered in this case, and why it can not

allow the claim of plaintiff to be asserted against the defendant and the property in the hands of this court.

In the first place the contract of guaranty declared upon by plaintiff is not within the charter powers of the defendant, and is therefore, *ultra vires*.

The statutes authorizing steam or commercial railroads to give assistance to other like companies in the form of guaranty or otherwise can not have application to interurban railroads. The purpose and the history of those statutes makes this clear even without the aid of decisions, though the latter support this view. *Ohio Electric Ry. Co. v. Ottawa*, 85 O. S., 229; *Comers. v. Traction Co.*, 75 O. S., 548; *Bridge Co. v. Iron Co.*, 59 O. S., 179.

It must be well understood that Section 8806 and kindred statutes were enacted many years ago for a distinct purpose to aid in the construction of steam railroads. A somewhat careful consideration was given these statutes by this court in *Manington v. Railway*, 9 N.P.(N.S.), 665. This well established rule is referred to as convincing proof that an electric interurban can have no such power to undertake such a guarantee as that declared upon in this case.

Neither can it be claimed that the defendant company had incidental power to undertake such contract of guaranty. True it has power to manufacture, furnish and sell electricity for light, heat, power and other purposes, and for doing all things incidental to said purpose. But it can not under the guise of an incidental power undertake to carry out a distinct purpose contrary to its granted powers. That is, it can not make an absolute guaranty to pay bonds of another separate proposed electric railroad in an amount of \$500,000, for the express purpose of enabling such other company to raise the necessary funds to build and construct another railway, and thus incidentally sell some electric power.

The guaranty is a paramount contract and not one incidental to the exercise of an express power given by charter.

The legal doctrine is that where a corporation enters into a contract beyond its powers, and receives no money directly, as

1915.]

Troy Trust Co. v. Railway.

the result of such contract, its receipt being merely incidentally enhanced thereby, it is not thus estopped to deny the validity of the contract. *Railroad v. Hotel Co.*, 102 Md., 307; 111 Am. St., 362, Note; 70 Am. St., 156-180.

The doctrine is applied for the purpose of preventing capital from being subjected to the risks of enterprises not contemplated by the charter. *Railway v. Bridge Co.*, 131 U. S., 371.

But it is insisted that the stockholders consented to the contract of guaranty. But that is without avail in view of the dominating influence of John G. Webb, who owned most of the stock, substantially all, in both companies, and who was desirous of selling \$500,000 bonds in order to raise money to pay himself for building the Marion & Bucyrus road.

It is contrary to public policy and inimical to individual and corporate rights that a person shall act in a dual capacity such as stockholder, director, president of two corporations, where he owns the majority of the stock, for the purpose especially of aiding him to carry out an individual contract of his own with one of the companies. It is plain that Webb as president, stockholder and director of both companies, and as contractor to build the road had a greater interest to take every step designed to solidify the bonds so they could be sold and so he could secure the money to build the road. Such a contract is avoidable, and a receiver as representative of all parties, shareholders, creditors, bondholders may avoid the contract. *Machen Corp.*, Section 1581; *Hayes v. R. R. Co.*, 38 N. J. L., 505; *Machen*, Section 1594.

I think the doctrine of *Goodin v. Canal Co.*, 18 O. S., 169, applicable.

Therefore, it is within the power and duty of the court, in view of the manner in which this case is submitted, and of the fact that the property of the defendant company is being held and administered by this court, to apply these principles, and to deny the plaintiff the privilege of proceeding with this action to judgment, and to refuse to allow it as a claim against the property in the hands of the receiver of the defendant company.

In view of the undenied claim made by the defendant that the defendant is insolvent, it would be, therefore, useless to allow judgment to be taken in this case.

It would be unjust, as well as unwarranted by law, to permit judgment for \$598,143.31 upon such an unconscionable contingent liability as is plaintiff's claim under the facts and conditions presented in the record. It would be likewise futile and useless to allow the claim, even if there was legal warrant therefor, because the defendant is hopelessly insolvent.

An order having been made consolidating this case with that of *Catrow v. C., D. & M. Ry.* the court has before it the facts that the bonded indebtedness of defendant is a total amount in excess of the value of the property and assets.

Plaintiff's right to maintain the action is denied, the finding and judgment is against the plaintiff, and the action is, therefore, ordered dismissed.

1915.]

Vayto v. Terminal & Ry. Co.

CONSTRUCTION OF THE WORKMEN'S COMPENSATION ACT.

Common Pleas Court of Cuyahoga County.

JOHN VAYTO V. THE RIVER TERMINAL & RAILWAY COMPANY; AND
K. CHARLES SCHMIDT V. THE INDUSTRIAL COMMISSION OF
OHIO; AND JACOB SMITH V. THE AMERICAN STEEL & WIRE
COMPANY.

Decided, July 9, 1915.

Workmen's Compensation—Right of Injured Employee to Sue a Party Other than His Employer—Meaning of the Phrase "Course of Employment"—Assumption of Risk—Pleading—Lawful Requirements by the Industrial Commission—Penal Character of the Compensation Act—Negligence Thereunder—Employer Not an Insurer of the Safety of the Place of Employment—Negligence of Employer Through Acts of Omission or Commission.

1. The workmen's compensation acts in no way, or in any manner, or in any sense, take away the right to sue and recover damages from a person other than his employer, who may have negligently inflicted injury upon him while in the course of his employment.
2. Under the compensation acts, "course of employment" is not so restricted as under the general doctrine relating to scope of employment. The general rule relating to course of employment under compensation acts may be thus defined: If the employee at the time of the injury was doing something he was authorized to do, or which may be fairly inferred or implied from the nature of his employment and the duties incident to it, he may be said to have been in the course of employment. Or it may be stated somewhat differently—was the servant at the time doing an act in furtherance of the master's business?
3. Whether the defense of the assumption of risk remains with the employer guilty of a wilful act or failure to comply with all lawful requirements for the protection of the lives and safety of employees is at least doubtful. Upon the assumption that statutes in derogation of common law rights must be strictly construed, it would seem that the right remains, as it is not expressly denied. Upon the theory that a wilful act or a failure to comply with any lawful requirement for the protection of employer, places the em-

ployer outside of the scope of the act and denies him the rights guaranteed by the act, it would appear he is to be treated under these circumstances as if the act never existed; and unless the defense of assumption of risk is denied by the Norris act or other related statutes, it remains.

4. The statute makes the finding of the commission on the question of course of employment final, and it can not be disturbed.
5. Whether the employer is a non-contributor or a contributor to the fund, or a direct compensator, ought to be stated in the petition, as a different rule applies to two of these classes. If a non-contributor, the defendant can not avail himself of the defense of the fellow-servant rule, assumption of risk, or contributory negligence. If the defendant is a contributor to the fund or a direct compensator, the action can only be maintained if the act causing the injury was wilful or if the injury arose from a failure to comply with some lawful requirement for the protection of the lives and safety of employees. If this is the ground upon which recovery is sought, the defenses of contributory negligence and the fellow-servant rule are available to the defendant.
6. The act provides that the commission shall have power to prescribe hours of labor, provide for safety devices and safeguards, and make and promulgate orders and general orders for the protection of the lives and safety and general welfare of employees; and these orders may become "lawful requirements" under certain conditions, under the compensation act.
7. The Ohio statute is penal in character, and it seems that acts criminal in nature ought to be clearly specified by legislative enactment.
8. The violation of a penal statute does not, in itself, necessarily furnish ground for a civil action, unless the violation of the statute is the proximate cause of the injury complained of; that is, if the act which causes the injury is made unlawful by statute, then the violation of the statute is negligence for which recovery may be had in a civil action. And if the violation is that of an act which imposes an absolute and positive duty, and the injury results proximately from and because of the violation, it is negligence *per se*.
9. The decision of the Lucas county court of appeals in *American W. M. Co. v. Schorling*, where the acts of negligence charged were those mentioned in Sections 15 and 16 of the act of March 18, 1913 (103 O. L., 95), to-wit: failure to furnish safe employment, safe place to work, to provide and use safety devices and safeguards and to use methods and processes reasonably adequate to render the employment and place safe, should be followed.

1915.]

Vayto v. Terminal & Ry. Co.

10. What specific acts of omission or commission on the part of the employer constitute a failure to comply with lawful requirements so as to bring an employee within the exception or reservation under Section 29 of the compensation act, must be determined by the court under the facts in each case. Only ordinary care will be expected in respect to these requirements, and the doctrine of *Railway Co. v. Frye*, 80 O. S., 289, that the limit of the employer's duty is to exercise reasonable and ordinary care having due regard to the hazards of the service, to provide an employee with a safe place in which to perform his work, must be applied.
11. It can not be held, without absolute danger to all industry, that an employer is an insurer of the place of employment, the safety of the employment and safety devices and safeguards unless they are specifically named, or the methods or processes employed unless they are named by statute.
12. Even under the act of June 15, 1911, a minor working at an age legally permitted under the laws of the state, is *sui juris* and having made application to the state liability board of awards for compensation, can not thereafter disaffirm his election on the ground of minority.

FORAN, J.

These cases and seven others are before the court on motions and demurrers which involve the construction of what is popularly known as the workmen's compensation law, or an act of the General Assembly of the state of Ohio entitled "An act to create a state insurance fund for the benefit of injured and the dependents of killed employees," approved June 15, 1911, and amended as approved March 14, 1913, as well as subsequently passed related enactments.

To rightly understand the purpose, scope and object of these enactments, a brief review of some of the causes which culminated in their adoption may throw some light upon the construction that should be given their provisions.

From about the middle of the nineteenth century the doctrine of common employment made it extremely difficult for a servant or workman, independently of statutory regulation, to recover from a master or employer for a personal injury received in the course of his employment, unless the injury was caused by the negligence of the master himself. In the operation

and enforcement of the rule it became increasingly difficult, even for courts, to precisely define what constituted a common employment. The courts devised, if they did not invent, a test upon which it was claimed the doctrine was based, and that is, that the servant, by virtue of his contract of employment, consented to assume or run all the risks incidental to the service, including the risk of negligence of fellow-servants; and in addition to those defenses the employer could rely upon contributory negligence of the injured servant, which, if a proximate cause of the injury, protected the master, even if he was negligent in the premises.

Under the doctrine of common employment, contributory negligence, and that expressed in the maxim, *volenti non fit injuria*, which perhaps may be all expressed under the term common employment, it became almost impossible for workmen injured in the course of their employment to recover compensation or damages.

The injustice of the rule was not so severely felt while industries were conducted upon a comparatively small scale, but when the mill, shop and factory system assumed gigantic proportions under modern industrial conditions, the hardships and injustice of the doctrine of common employment became so grave and serious as to demand legislative attention and action.

In 1880 England passed an employer's liability act, which was shortly thereafter copied almost literally by Massachusetts, Wisconsin, Alabama, New York and other states. These acts applied largely, however, to selected industries, and their effect was to abridge, if not destroy, the doctrine of common employment in a few specific cases. In Ohio the act of April 2, 1890 (87 O. L., 150), was passed for the protection of railroad employees, and largely added to the common law rules of liability. 51 O. S., 130.

Other enactments prior and subsequent to this act for the protection of workmen were passed by the General Assembly of Ohio, such as provided for the guarding of dangerous machinery, places and ways, the erection of scaffolds, providing sufficient light in certain places, defining what is meant by superior serv-

1915.]

Vayto v. Terminal & Ry. Co.

ant, and granting relief notwithstanding negligence of fellow-servants.

The legislation in this direction finally culminated in the act of May 12, 1910, sometimes called the Norris act. Many of the provisions of this act are merely declaratory of the common law, statutory and precedent law as it existed at the time. Many new things, however, including the doctrine of comparative negligence, are found in this act.

This remedial legislation, however, did not prove a panacea for existing evils and others that arose coincident with and subsequent to it. The employers sought protection under the folds of liability insurance. The service of the lawyer trained and skilled in the law of torts became less imperative; the iron rule of the demurrer and the non-suit became less effective; but between the unfair methods and the pernicious activities of the agents of the casualty companies and the exactions of the fifty per cent. contingent fee lawyers, both the employers and the workmen were ground as between the upper and nether millstones of industrialism, and the result is the workmen's compensation act.

The purpose of the act is wise and beneficent. It is by no means perfect; indeed it must be admitted that it is, if not tentative, at least crude, immature, inharmonious and disjointed, evidently the result of a compromise between clashing interests. The act and related acts were copied largely from the English workmen's compensation act of 1897 and subsequent acts for the regulation of factories and workshops, as well as acts amendatory thereto, the Ohio act evidently seeking to class certain occupational or industrial diseases as accidents, as, for instance, the act of May 6, 1913 (103 O. L., 819), with reference to the "general duties of employers" with respect to the prevention of certain occupational or industrial diseases.

The workmen's compensation and related acts introduced an entirely new principle, as servants, operatives and workmen are by their provisions given the right to compensation for injuries received in the course of their employment, absolutely irrespective of negligence or contributory negligence. In effect the law,

except in cases where the injury is the result of a wilful act or failure to comply with lawful requirements for the safety of employees, abolishes the right of the employee to bring an action for damages against his employer for injuries sustained in the course of his employment, and substitutes for that right certain definite compensation from the state insurance fund, or from the employer if he elects to directly pay his employees, or from non-contributors to the fund. The amount is called compensation, not damages; and as essential to the receiving of this compensation, it is not necessary that the injury be the result of negligence in any sense. If the injury is not self-inflicted, and is received in the course of employment, compensation must be awarded, either by the industrial commission, or suits may be brought for damages in the excepted cases.

This is wholly and absolutely a new right not known to the law of this state before the passage of these acts. All injuries received by workmen in the course of their employment, not purposely self-inflicted, are in effect regarded as accidents or occurrences not due either to design or negligence as defined by the law of torts.

In the struggle for existence, the greater part of mankind, of a necessity older than civilization, must labor for maintenance, for the support of themselves and their families, even for the superfluous requirements of others. As civilization advanced, however, protection and better conditions for workmen challenged the attention of humanitarians and legislators.

The compensation provided for by the acts under consideration is in no sense a charity; it is a right based upon natural justice. Employees and employers, in the field of industrialism, are engaged in a fierce struggle with competitive forces which act and react upon each other. In this struggle many are maimed and killed, and a wise, enlightened public policy demands that the wounded and the dependents of the killed shall be compensated. In work-shops and factories, even with the most improved protective devices and precautions, accidents are inevitable; workmen are always under orders, either peremptory, express or implied; and without obedience to orders production would cease

1915.]

Vayto v. Terminal & Ry. Co.

and industrial chaos reign supreme. If every workman in a factory should stop to ponder and deliberate the consequences of every movement he makes in obedience to orders, express or implied, his efficiency as a factor in production would be of no practical value. The court evidently had this view in mind in the case of *Van Duzen Gasoline Engine Co. v. Schelies*, 61 O. S., 310, when it said:

“There is much reason in the rule that allows a favorable construction to be placed on the act of the servant done in obedience to the order of his superior, though involving danger. Obedience to orders given by a master becomes a habit with the servant. He obeys without much questioning the prudence of the order. It is expected that he will do so, and without such obedience the business of the master could not be successfully conducted.”

The natural instinct of normal men in their sober senses to avoid injury and protect or preserve life and limb must be taken as a guaranty that they will use all the care to that end that the situation and circumstances under which they labor will permit (Section 136, *Buswell on Personal Injury*); hence it is no more than just that workmen, if injured in the course of their employment, or their dependents if killed, should be compensated under any and all circumstances where the injury is not purposely self-inflicted. The employer has no just ground to complain, for in the final analysis the consumer and not the producer bears the burden. All taxes, all rents, all costs of production and distribution, by a system or process of percussive and repercussion, are finally paid and borne by the consumer.

Peet v. Mills, Supreme Court of Washington, 136 Pac., 686, was a case involving the construction of a workmen's compensation act somewhat similar to that now under consideration. In passing upon the purposes of and the reasons for the act, the court say:

“To say with appellant that the intent of the act is limited to the abolishment of negligence as a ground of action against an employer only, is to overlook and read out of the act and its declaration of principles the economic thought sought to be

crystalized into law, that the industry itself was the primal cause of the injury and, as such, should be made to bear its burdens. The employer and employee as distinctive producing causes are lost sight of in the greater vision, that the industry itself is the great producing cause, and that the cost of an injury suffered in any industry is just as much a part of the cost of production as the tools, machinery, or material that enters into that production."

There is much wisdom in this dictum; and if employers of labor could only be made to understand the truth and force of the reasoning, there would be less friction between labor and capital and less objection to compensation acts. Employers ought to understand that any injury to a distinct part of society is an injury to the whole, including those whose capital is invested in industrial pursuits. That the consumer eventually pays all the cost of production, including compensation to workmen, is everywhere recognized as an inevitable law of political economy. The premiums paid into the state insurance fund are simply a species of tax upon the industry, which the consumer pays when he buys the products of industry. Commerce carried in ships is insured against the risks and dangers of ocean transportation. The consumer pays this insurance. The consumer pays the insurance paid by merchants, as well as the cost of advertising, the interest on capital invested, and the rents paid, as well as all expense of distribution. The risks and dangers of industrialism are always great and always will be, and common humanity demands that the victims of these risks and dangers shall be compensated.

The act of June 15, 1911, was the result of the report of a commission appointed by the governor of the state by virtue of an act passed May 10, 1910 (101 O. L., 231). This commission was appointed to inquire into industrial conditions in this and other countries. The conclusions reached by the commission in its report were, substantially, that the methods or system of dealing with industrial accidents are unsound and wholly inadequate; that the system as a whole was productive of enormous waste; that actions at law for personal injuries, while annoying

1915.]

Vayto v. Terminal & Ry. Co.

and harassing to employers and employees, furnish no practical remedy for the injured, and that there existed widespread public sentiment that the general welfare demanded a radical change in the direction of improved conditions.

The act of June 15, 1911, was declared constitutional in *State, ex rel v. Creamer*, 85 O. S., 349. While the mandatory act of March 14, 1913, is much broader in scope, the underlying principle is the same in both acts; so that it may be said that the act except, perhaps, Sections 22 and 27 and related acts now under consideration do not contravene any provision of the Constitution of the state, and this is especially true in view of the amendments to the Constitution of September, 1912, which will be referred to hereafter.

The right to pass the act of June 15, 1911, was held, in *State, ex rel, v. Creamer, supra*, to be a proper exercise of the police power of the state, which embraces all things necessary to secure and conserve the peace, safety, health, morals and best interests of the state and its people.

The right of the Legislature to abolish common law defenses to an action for damages for the negligence of an employer has been sustained by the courts of last resort in several states, as well as by the Supreme Court of the United States.

In the case of *Mondou v. Railroad Company*, 233 U. S., 1, in answer to the contention that such right did not exist, the court said:

"A person has no property, no vested interest in any rule of the common law; and while property rights which have been created by common law can not be disturbed without due process, the law itself, as a rule of conduct, may be changed at the will * * * of the Legislature, unless prevented by constitutional limitations."

This decision was rendered under a federal liability act passed in the interests of workmen, and abolished certain common law defenses. But if there is any possible doubt about the matter, it is removed by the constitutional provision found in Article II, Section 35, of the Constitution as amended in September, 1912, which reads:

"Section 35. For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational diseases, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state determining the terms and conditions upon which payment shall be made therefrom, and taking away any and all rights of action or defenses from employees and employers, but no right of action shall be taken from any employee when the injury, disease or death arises from a failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employees."

It will be seen by this amendment plenary power is conferred upon the Legislature, not only to create the fund, but to compel all employers of workmen to contribute thereto, as well as to take from employees all right of action against employers, and from employers all right of defense to such actions. The right and the remedy that existed before the act of June 15, 1911, and such right and remedy as existed after this act and prior to March 14, 1913, for injuries received in the course of employment, is taken from workmen, and in lieu thereof is substituted a new right and a new remedy, with the reservation that no right of action shall be taken from the workman or employee "when the injury, disease or death arises from a failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employees."

In the act of June 15, 1911, the reservation or exception, as provided by Section 21-22, was that actions might be instituted in the courts in case the injury arose "from wilful act of such employer or any such employer's officers or agents or from the failure of such employer or any of such employer's officers or agents to comply with any municipal ordinance or lawful order of any duly authorized officer, or any statute for the protection of the life or safety of employees." For these words, aside from the phrase "wilful act," the single and simple phrase "lawful requirement" is substituted, in accordance with the constitutional provision in the act of March 14, 1913. The purpose of this change will be discussed later.

1915.]

Vayto v. Terminal & Ry. Co.

It will be noticed that the words "wilful act," which appear in the exceptions or reservations in the act of June 15, 1911, also appear in Section 29 of the act of March 14, 1913.

In *McWeeny v. Standard Boiler Company*, decided January 15, 1914, — Fed., —, Judge Day, of the federal court, rightly and properly held that these words were not limited in their meaning "to an act done intentionally with the purpose to inflict injury, but include acts which are not mere negligence, but which evince an utter disregard of consequences so as to inflict injury." This definition or construction seemed to the Legislature to enlarge the reservation contained in the constitutional provision; and in the act of the Legislature, and at the special session of the Legislature which convened January 19, 1914, it was enacted that "the term 'wilful act' as employed in this section (29) shall be construed to mean an act done knowingly and purposely with the direct object of injuring another" (104 O. L., 193). Hence a "wilful act" is in fact by legislative enactment defined to be a criminal act, for if a man does an act knowingly, with the direct object and purpose of injuring another, and in fact does so injure another, the act would be nothing less than assault and battery; and if death resulted from such injury, it would be at least manslaughter, and might perhaps be murder. The probability that an employer would knowingly, purposely and wilfully injure, assault, or set a trap to injure one of his employees is so remote that the object of retaining these words in the act is difficult of comprehension, unless it can be said that if an employee should be so injured, his right of action must be preserved, lest it be lost for the reason that the injury was sustained in the course of employment, a contention which is extremely doubtful any court would entertain. This is one of the inconsistencies of the act. At all events it would be useless to plead "wilful act" as an exception under Section 29, unless the wilful act is in fact a criminal act.

In this connection it may be quite pertinent to ask why the Legislature did not fully exercise the power conferred upon it by Section 35, Article II of the Constitution, and establish a state insurance fund "by compulsory contribution thereto by

employers," that is, by requiring all employers to be contributors to the fund.

The elective provision of Section 22, by virtue of which certain employers may elect to directly pay compensation to their employees, or become what may be termed direct compensators, is an anomalous inherent weakness, and the act will not be perfect until it is eliminated. The act gives the direct compensator all the benefits of the reduced compensation, for no one will contend that full compensation is provided for, and it leaves the employee in the disagreeable position of claiming compensation from his employer or of losing his situation if he applies to the commission to have an award made which will become a liquidated claim for damages against the employer; and besides, the direct compensator may, under Section 54, contract for indemnity insurance if the contract provides for the payment of the compensation, nursing, medical and hospital services and medicines provided for by the act. This leaves the door open to all the evils of employers liability insurance, of which workmen have heretofore justly complained. This elective provision is a monstrous excrescence and must be cut out, and contribution to the state insurance fund by all employers be made compulsory, or the act will fail of its purpose and crumble of inherent weakness, inefficiency and want of uniformity and inadequacy of remedy to the injured and the dependents of killed employees.

The cases now before the court do not require us to hold that Sections 22 and 27 are unconstitutional, but we are clearly of the opinion these sections are repugnant to the organic law of the state.

In *State, ex rel, v. Creamer, supra*, it was held the act of June 15, 1911, found its validity in the police power of the state, a power Prof. Freund says has never been circumscribed, but continues to be elastic, as it reveals a "power not as a fixed quantity, but as the expression of social, economic and political conditions." The police power, however, is not invoked by the Legislature except in instances where the Constitution is silent as to its exercise. The Constitution as amended September, 1912, expressly grants power to the Legislature to pass compensation

1915.]

Vayto v. Terminal & Ry. Co.

acts or laws; and the organic law having taken cognizance of the subject, we believe the Legislature can only act in strict accordance with the power granted, and in the manner specified, and that is to establish "a state fund to be created by compulsory contribution thereto by employers, and administered by the state."

This surely means compulsory contribution to the state fund by all employers amenable to the provisions of the act.

It may be claimed that because Section 22 provides for election by employers, this section is not repugnant to Section 35, Article II. But if this contention is sound, which is more than doubtful, still it must be insisted that Section 27 takes property without due process of law, and that Section 22 creates classes of employers.

The act of June 15, 1911, only deprives non-contributors of certain common law defenses, but, as has been seen, "a person has no property, no vested interest, in any rule of the common law." Section 27 of the act under consideration does deprive certain employers of the right of "due course of law" which "implies and requires that the parties litigant shall each have a day in court." (*Railroad Co. v. Sullivan*, 32 O. S., 152.) And by "court" is here meant, of course, a constitutional court, where trial by jury may be had if questions of fact are in issue. The industrial commission, by virtue of Section 22, may require such security or bond from direct compensators as it may deem adequate and sufficient to secure compliance with the provisions of the act. If a man employing from five to thirty men is unable to furnish the bond required, he must pay the premiums provided by the act, although he may never have an injury or accident in his factory or shop. Like the holder of an accident policy who is never injured, he pays for those who are injured. This is manifestly inequitable and unjust, and does make "an unjust and arbitrary classification and does not affect all who are within the reason" and scope of the act alike.

As was said by *Locke on Civil Government*, Section 142, a constitution is the bounds set to the legislative power of every commonwealth "to govern by promulgated established laws, not

to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plow." A statute is not constitutional which "would select individuals from a class or locality and subject them to peculiar rules or impose on them special obligations or burdens from which others in the same locality or class are exempt." *Cooley on Constitutional Limitations*, 537.

The same authority, page 563, says:

"The state should have no favors to bestow. Special privileges are obnoxious, and discriminations against persons or classes still more so."

We have no hesitancy in saying that Sections 22 and 27 of this act are repugnant to Section 5, Article I; Section 26, Article II, and Section 35 of Article II of the Constitution of Ohio, and the Fourteenth Amendment to the Federal Constitution. These sections were evidently inserted in the act to placate a few large employers who are able to organize and maintain special accident or claim departments, and who foolishly and selfishly believe that indemnity insurance is a panacea for the evils of careless and negligent operation of industrial enterprises, as well as for the unskilfulness and negligence of laborers who are largely recruited from the agricultural districts of Southern Europe, and who too frequently become the victims of their own ignorance and failure to understand orders given to them by their superiors. These employers lose sight of the larger view, that as God notes the fall of a sparrow, so too society should note the slightest injury to any of the intigers of which the whole is composed.

It would seem also that in view of the fact that there is no appeal from an award made by the commissioners to an employee of a direct compensator, such employee is also deprived of his day in court and deprived of a jury trial, and that the sections for that reason are also repugnant to the Constitution of the state.

It was held in *State, ex rel, v. Creamer, supra*, that the act of June 15, 1911, created no new right, Johnson, J. saying, page 408:

1915.]

Vayto v. Terminal & Ry. Co.

"It creates no new right or new remedy for wrong done. It is an effort to in some degree answer the requirements of conditions which have come in an age of invention and momentous change."

This opinion was rendered February 6, 1912. The amendment to the Constitution above referred to went into effect January 1, 1913. The act of March 14, 1913, and related acts do create a new right and give a new remedy to the employee. But while these acts in effect practically take from the employee the right to sue his employer for damages, they in no way nor in any manner nor in any sense take away the right to sue and recover damages from a person other than his employer who may have negligently inflicted injury upon him while in the course of his employment.

While the act and related acts are far from being perfect, and contain many weak and inefficient provisions, and lack many provisions necessary to practical and efficient enforcement, they certainly do not deprive the employee of a right of action against a third person who injures him while he may be or is in the course of his employment. Hence, if the driver of a lumber wagon, in the course of his master's business, is negligently injured by a railroad company while crossing its tracks upon a public highway, he may recover from the wrong-doer, notwithstanding he has recovered compensation or has been awarded compensation by the state industrial commission from the state insurance fund, for the injury.

There is no possible justification in law or ethics or morals for the principle or proposition that a railroad company, or any other corporation or person, may wantonly or negligently injure a man and claim immunity on the ground that the injured man received compensation from the state insurance fund. The act or law does not provide for full compensation; and even if it did, to hold that a third person might negligently injure a man while that man was in the course of his master's business, and escape liability merely because the man's employer was a contributor to the state insurance fund, would inevitably lead to wanton destruction of limb and life. To so hold would be

tantamount to holding that because a man has ample insurance upon his life, another may negligently kill him; or if he has an accident policy, another may wantonly injure him, and plead the payment of the insurance as a defense to an action for the injury or death. It has been so uniformly held that this can not be done that it would be useless and unnecessary to cite authorities in support of the proposition. The English act of 1906 provides in express terms that an employee injured in the course of his employment, by a third person, "shall not be entitled to recover both damage and compensation." The Ohio statute places no such limitation upon the rights of an employee. Besides, it must be remembered that in many respects the compensation provided for by the act under consideration is in the nature of a wage pension. Section 32 provides that in case of temporary disability, the employee shall receive sixty-six and two-thirds per cent. of his average weekly wage so long as the disability is total, not to exceed twelve dollars a week. Section 33 is in some respects similar, except that it provides specifically the amounts to be paid for certain specified injuries, as weekly wages during specified periods. Sections 34, 35, 36 and 38 relate to continuance of payments of compensation or wages, to whom paid in case death results, and other matters of detail. In some instances the payments continue until the death of the injured employee. In other instances the time during which payments shall continue is definitely fixed; but by Section 39 it is provided, "The powers and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings and orders with respect thereto as in its opinion may be justified."

From a consideration of these provisions it becomes apparent at a glance that the doctrine forbidding double compensation or double recovery for the same wrong can have no application, and may not be invoked by a third person who has negligently caused an injury to an employee while engaged in his master's business, even though such employee has made application for and has been awarded compensation by the industrial commission. Suppose, for instance, the commission should find the injury

1915.]

Vayto v. Terminal & Ry. Co.

resulted in permanent total disability, "the award (Section 34) shall be sixty-six and two-thirds per cent. of the average weekly wages, and shall continue until the death of such person;" but who can tell how long such person may live? Or suppose the disability is only partial, and the award is made to continue for sixty or seventy-five weeks, the total amount of the award can not be determined; for under Section 39 the commission "may from time to time make such modification or change with respect" to it "as in its opinion may be justified." If the disability is temporary, an award may be made, under Section 32, to continue for six years; but in case the temporary disability disappears, the award may be changed at any time, or it may be reduced or modified. Then again, under Section 35, if death results in two years, the benefits, amounts thereof not to exceed \$3,750, and to whom distributed, are provided for; but though the amount may be fixed under this section or Section 32, no one knows whether the man will die within two years, or whether the temporary disability provided for in Section 32 may not at any time cease and the award be modified by the commission.

Again, it must not be forgotten that an employee is entitled to the compensation provided for in the act, even though the injury be the result of his own gross negligence, and that the employer was in no sense responsible for it, and was in no sense a wrong-doer. Under such circumstances, how can it be said the employer is a tortfeasor?

We think it as a fair construction of this act to hold that it was the intention of the Legislature to make all payments provided for compensation in lieu of wages. Indeed the sections just referred to seem to clearly indicate this intention, if they do not expressly provide that the compensation payments are received by the employee or his dependents precisely in the same manner and in the same sense as wages are ordinarily paid. If there is any doubt as to this view, we think it disappears in view of Section 41, which reads:

"Compensation before payment shall be exempt from all claims or creditors and from any attachment or execution, and shall be paid only to such employees or their dependents."

The industrial commission has held, and properly so, that these statutory compensations are not to be reduced by reason of a judgment against or settlement with a third person who may have been a tortfeasor. See Department Reports, February 11, 1915, page 836, in which it is held that:

"Where an employee is injured while in the course of his employment, and a tortfeasor other than his employer is responsible therefor, his right to receive compensation in accordance with the workmen's compensation act of Ohio is not lost by settlement with the tortfeasor."

New Jersey has a workmen's compensation act similar to the Ohio act. In *Painting Company v. Klotz*, 85 N. J. L., 432, it is said in the syllabus:

"Where a workman is injured by an accident arising out of and in the course of his employment, and a tortfeasor other than his master is responsible therefor, the right to compensation under the act of 1911 is not lost by settlement with and release of a tortfeasor."

On page 434 of the opinion the court say, after stating the general policy and reason for the act:

"These considerations suffice to show that the right to compensation under the statute, and the right to recover damages of a tortfeasor, are of so different a character that the rule of law appealed to by a prosecutor is inapplicable."

That there must be full and complete satisfaction for a wrong or an injury before all persons who are liable or responsible therefor are released or discharged from liability, without the consent of the injured, is so well established that authorities need not be cited in support of the proposition. In view of the fact that the compensation awarded under the act is admittedly not full or complete, and that its amount can not be definitely fixed, or, if so fixed, is in many instances subject to change or modification, the application of the doctrine of double recovery, as has been said, is, under all the circumstances, impossible and need receive no further attention.

1915.]

Vayto v. Terminal & Ry. Co.

There can be no doubt as to the soundness of the decision of the industrial commission just cited, and of course the converse of the proposition must be equally sound—that the tortfeasor, or third person, can not be permitted, even in mitigation of damages, in a suit brought against him, to plead the fact that the injured person, or his dependents in case of his death, received compensation from the state insurance fund. In many of the states where workmen's compensation acts are in force the right of subrogation against the tortfeasor is expressly preserved to the employer or the state; but in the Ohio act no such provision is made; and in the absence of such statutory provision the right of subrogation must be denied. But it does not follow that because this right is denied, the right to recover from a tortfeasor renders the right to the compensation provided for obnoxious to the doctrine of double compensation or double recovery for the same wrong, and for the reasons already pointed out. Nor can the principle be affected by the fact that the tortfeasor is also a contributing employer to the fund.

In the case of *Vayto v. The River Terminal Railway Co.*, No. 140041, the River Furnace Company, for which the plaintiff was working, owned certain ladle cars, which the plaintiff was engaged in cleaning. The defendant railway company owned the tracks and engine, and the plaintiff claims he was injured while passing from one track to another, through the negligence of the defendant railway company. Counsel for the defendant company claim it was engaged with the plaintiff in a common service for the River Furnace & Dock Company. Admitting this to be true, it furnishes no reason why the railway company should escape liability for its act if it negligently injured the plaintiff. He was certainly in the line of duty or line of employment for the River Furnace Company, and was entitled to compensation from the fund; and to hold that the railway company might negligently injure him, and escape liability simply because his employer was a contributor to the state insurance fund, would be a monstrous proposition which, if allowed, would practically amount to a license to negligently injure and kill employees whose employers are contributors to this fund. Take

the case of a street railway, for instance, which is erecting a car barn. It has a contract with a man to put a roof upon the barn through which its tracks run. Its own employees are working on these tracks. One of the contractor's employees negligently drops a hammer, which injures or kills the employee of the railway company. Both servants are engaged in a common service for the railway company; but it can not be held that the tortfeasor is not responsible for the wrong done the employee of the railway company, simply because the railway company is a contributor to the state insurance fund. Such a holding would practically nullify the provisions of the act. That the right of subrogation does not exist is a matter for the Legislature, and not for the courts.

In the consideration of some of the issues now before the court, it becomes important to define what is meant by the phrase "in the course of employment," as used in Section 21 of the act.

The industrial commission has held that a man going from his place of employment to his home after his work for the day has ended was not in the course of his employment; and in another case, that a servant who was injured while fooling with his fellow-workmen during the noon hour was not in the course of his employment. But a servant who was bitten by a dog while engaged in the work he was employed to perform, was held by the commission to be in the course of his employment. And in another case it was held that an employee who was injured while going from the place where he was at work to the office to receive his pay was in the course of his employment. And again, an employee whose duty was in part to drive a delivery wagon, but who on Saturday was required to take the horse to the country to pasture and return on Monday, and he was injured while preparing to return to the city, was held to be in the course of his employment. See 12 O. L. R., 545-551.

In *Terlecki v. Strauss*, 85 N. J. L., 454, an employee who quit work at a machine shortly before noon, and was, according to custom, combing particles of wool from her hair, preparatory to going home, some distance from her machine, when she was injured by her hair being caught in other machinery, it was held

1915.]

Vayto v. Terminal & Ry. Co.

the accident arose out of and in the course of her employment. This is undoubtedly upon the theory that combing wool out of her hair was an incident to the business. The court said:

“The employment was not indeed the proximate cause of the accident, but it was a cause in the sense that but for the employment the accident would not have happened.”

Again, a collier was injured while leaving his work and crossing lines of rails controlled by his employer. He might have taken a different route and avoided the rails or tracks, but the route he took was the shortest and was commonly and ordinarily used by the workmen, with the knowledge and consent of the employer. It was held the accident arose out of and in the course of the employment. *Dare v. Colliery Company*, 2 K. B., 539 (1909).

Other instances might be cited indicating that under the compensation acts “course of employment” is not so restricted as under the general doctrine relating to scope of employment. The general rule relating to course of employment under compensation acts may be thus defined: If the servant at the time of the injury was doing something he was authorized to do, or which may be fairly inferred or implied from the nature of his employment and the duties incident to it, he may be said to have been in the course of employment. Or it may be stated somewhat differently—was the servant at the time doing an act in furtherance of the master’s business? It may also be said, in determining, under these acts, whether an employee is in the course of employment, that the law will undoubtedly not make any fine distinctions fixing just what is meant by “the course of employment;” and where there is doubt it will be resolved against the defendant, upon the ground that the defendant put the servant in motion and he would not have been injured but for the employment.

So far as the English decisions under the workmen’s compensation act have gone, they seem to indicate that if what the workman is doing at the time of the injury is no act of service, but simply for his own pleasure, or if he is improperly meddling

“course of employment”
limited.

with that which is no part of his work, it is held that the accident or injury does not arise out of and in the course of his employment; but if, while engaged in the master's work, he acts upon an emergency, and does anything in his master's interest, even though the thing he does is not part of the work he was employed to do, still the accident or injury is said to arise out of and in the course of his employment.

This also seems to be the doctrine of the decisions in this country. It is not whether the servant is acting under instructions from the master, or under orders, but whether the act may fairly be said to have such connection with the business as may be incident to it or be fairly implied from its nature.

P. 112 f. The purpose of the Ohio act and subsequent acts related to it is to compensate in a measure every operative, workman or employee for every injury, not purposely inflicted, received or sustained in the course of his employment, whether working for or rendering service to a person, firm, private or public service corporation, or to the state or political subdivision thereof, under any appointment or contract for hire, express or implied, except public officials, policemen and firemen in cities where pension funds are now or may hereafter be established. In the event death results from an injury, the dependents of the killed workman receive the compensation. The state, counties, school districts and municipal corporations must contribute to the fund. Employers of labor may or may not; and under certain conditions an employer may elect to pay directly to his employees the amount that would be paid by the industrial commission if the employer elected to pay the premiums fixed by the commission.

A brief analysis of some of the provisions of the act may help us to better understand it.

The law as first enacted created a state liability board of awards. The duties and functions of this board are now performed by the industrial commission, under the act of March 18, 1913 (103 O. L., 95). Plenary powers are given to the commission within the provisions of the act and related acts. Every employer of the state employing five or more employees regu-

1915.]

Vayto v. Terminal & Ry. Co.

larly in the business in which he is engaged shall, in the month of January of each year, furnish the commission certain information on blanks furnished by the commission. This information is secret and for the exclusive use of the commission, which is empowered to classify occupations with respect to their degree of hazard, and fix rates of premiums sufficiently large to provide an adequate fund for the compensation provided for by the acts; also to adopt rules and regulations as to the collection of these premiums. The treasurer of the state is made the custodian of the fund. The surplus may be invested in federal, state or municipal bonds; and provision is made how the surplus may be created. The state, every municipal and *quasi*-municipal corporation, every school district, every person, firm and private and public service corporation having regularly in its service five or more workmen, are employers and subject to the provisions of the act. Every employer shall pay to the fund the amount provided in the act or fixed by the commission, which is given full and ample power to compel the payment. The fund consists of the premiums paid by employers, as fixed by the commission, and one per centum of the amount of money expended by the state, counties, municipal corporations and school districts each year for the service of the persons named in the act. The employees of direct compensators and employees of persons, firms or corporations which are not contributors to the fund can not participate in this fund or receive compensation from it. While their right to compensation for all injuries not purposely self-inflicted is the same, they must receive this compensation, if at all, from the direct compensator and the non-contributing employers.

In seeking to realize results on this phase of the act, its crudity, incompleteness and want of unity become strikingly apparent.

Section 22 provides that any person, firm, private or public service corporation employing five or more workmen regularly, and of sufficient financial ability, may, under certain prescribed conditions, become a direct compensator and elect to directly compensate their injured and the dependents of their killed em-

ployees, in which event they are not required to pay the prescribed premium, except such amount as may be required to be credited to the surplus fund created by the act. The direct compensator, however, is required to pay an amount "which shall in no event be less than that paid or furnished out of the state insurance fund, in similar cases, to injured employees or to the dependents of killed employees, whose employers contribute to said fund." But they are not liable to respond in damages at common law or by statute, except the injury arises as is provided in Section 29, that is, from the wilful act of the direct compensator, his officers or agents, or from failure of the direct compensator, his officers or agents, to comply with any lawful requirement for the protection of the lives and safety of its employees, in which event the employee (or, in case death results, his representative) may, at his option, either claim compensation under the act, or institute legal proceedings for damages; to which action, however, the defenses of contributory negligence and the fellow-servant rule may be invoked. If the direct compensator fails or refuses to pay the compensation, and render services, such as surgical care and medical attendance and hospital accommodations provided for by the act, the injured employee (or his representative in case death results from the injury) may file his application with the commission for compensation, and the commission shall hear and determine the same and fix the compensation in like manner as in other claims before the commission; and unless the amount so determined is paid by the direct compensator within ten days after receiving notice thereof, it becomes a liquidated claim for damages, with an added penalty for fifty per centum, and may be recovered in an action in the name of the state for the benefit of the persons entitled to receive it.

This elective provision, in Section 22 of the act, is open to serious objection, as will be presently seen.

Section 29 gives the employees of contributing employers the same right to institute legal proceedings under the same conditions, that is, for wilful act or failure to comply with any lawful requirement for the protection of the life and safety of the em-

1915.]

Vayto v. Terminal & Ry. Co.

ployee. An employer employing less than five workmen regularly may avail himself of the provisions of the act, and an employee who remains in the service with notice that he has done so must, in case of any injury, recover compensation, if at all, under the provisions of the act.

By paragraph 2 of Section 13, it is provided that every person, firm, private or public service corporation that has in its service five or more workmen regularly in the same business, is an employer within the sense and meaning of the act. But by Section 24 a person or corporation employing less than five workmen regularly is also called an employer. This is another of the inconsistencies of the act.

By the first clause of Section 25 it is provided, that the commission "shall disburse the said insurance fund to such employees of employers as have paid into said fund the premiums applicable to the class to which they belong, who have been injured in the course of their employment, wheresoever such injuries have occurred, and which have not been purposely self-inflicted, or to their dependents in case death has ensued."

It will be seen by this section that the commission can disburse the fund only to the employees of employers who have paid into the said fund the premiums applicable to the class to which they belong.

Firms, persons, private or public service corporations who fail to take advantage of the provisions of the act are not entitled to the benefits of the act; and in actions against them for damages for injury or death from injury, the defenses of the fellow-servant rule, assumption of risk and contributory negligence are not available to them. Nor is it necessary, in an action against a non-contributor, to allege or prove that the act which caused the injury was a wilful act, or that it resulted from a failure to comply with any lawful requirement made for the protection of the lives or safety of employees. All the rights which an employee had before the passage of the act remain to him with respect to non-contributing employers, together with the added remedy that the defenses just named are not available to the employer.

This is a sort of coercive inducement to all employers to avail themselves of the provisions of the act. But by Section 27 it is provided that an employee whose employer has failed to pay the premiums provided by the act may elect either to file his application with the board for compensation, or institute legal proceedings against his employer. If he files an application with the commission, the amount of compensation fixed by the commission becomes, after ten days' notice, a liquidated claim for damages, which, with an added penalty of fifty per centum, may be recovered in the name of the state against the employer for the benefit of the persons entitled to it.

This provision in effect makes the act mandatory either to be a contributing employer or a direct compensator.

By Section 29 it is provided that an employee, or his legal representative in case death results, who makes or files application for an award, or accepts compensation from a direct compensator, waives his right to exercise his legal option to institute legal proceedings, except that in certain contingencies the right of appeal from the action of the commission to the court of common pleas is reserved. This provision of the act should be constantly borne in mind.

So much of Section 43, relating to appeals, as is applicable, reads as follows:

"Section 43. The board (commission) shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final. Provided, however, in case the final action of such board (commission) denies the right of the claimant to participate at all in such fund on the ground that the injury was self-inflicted or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, then the claimant, within thirty days after the notice of the final action of such board (commission) may, by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it."

It will be seen here that the word "appeal" is really a misnomer; that is, the right given is not an appeal in the ordinary

1915.]

Vayto v. Terminal & Ry. Co.

sense, for it is provided that he shall be entitled to a trial in the court of common pleas in the ordinary way, and be entitled to a jury if he desires it.

It may also be noticed that this is the only section in the act where the word "accident" occurs.

It will be seen at a glance that this section giving the right of appeal limits the right to cases in which "the final action of such board (commission) denies the right of the claimant to participate at all in such fund." The only persons who have a right to participate in the fund are the employees of employers who contribute to the fund, and the employees of the state, municipal, quasi-municipal corporations, and school districts.

In the case of *Schmidt v. The Industrial Commission*, now before the court, it is admitted that the plaintiff, when injured, was employed by a direct compensator; that he was injured on September 4th, 1914, and made or filed an application for compensation with the industrial commission, which on March 31st, 1915, made an award allowing compensation for disability to December 18th, 1914, the commission holding that disability subsequent to that date was not caused by the injuries received September 4th, 1914. From this award an appeal was filed in this court April 4th, 1915, and petition filed, to which a demurrer has been interposed.

Counsel for plaintiff contend that the word "fund" as used in the act should be so construed "as to cover not only the money which the commission orders paid from the state treasury to the injured party, but also money which the said commission orders paid by the employer to the injured party."

In *Peet v. Mills*, 138 Pac., 638, *supra*, the Supreme Court of the state of Washington had under consideration a question arising under the workmen's compensation act of that state. In the syllabus it is said:

"Remedial statutes should be liberally construed to cure the evils sought to be remedied, and advance the remedy even by including therein cases without the letter, but within the reason of the statute."

It was formerly thought, and so expressed in a maxim, that it was the part of a good judge to enlarge his jurisdiction; and

in construing the statute under consideration there are many reasons why such a course should be pursued, unless it should contravene the plain letter of the law. It should be remembered that courts belong to the judicial, and not to the legislative department of government. The rule as we understand it is, that where the language of a statute is clear, there is no reason for construction, and the spirit of a provision, be it statutory or constitutional, must be extracted from its words and not from conjecture. The courts should not extend their powers by far-fetched implication, any more than they should defeat the purpose of a statute by a narrow or unreasonable construction. *Cass v. Dillon*, 2 O. S., 607; *Wilcox v. Nolza*, 34 O. S., 520.

By Section 9 of the act it is provided that "the treasurer of state shall be the custodian of the state insurance fund." And it can not be said, even by implication, that moneys not in the hands of the state treasurer, and that never will be in his hands or under his control, are any part of that fund.

If a sinking fund is maintained by taxation, can it be said that taxes not yet levied or moneys not yet earned or collected are a part of that fund? As here understood, a fund is a stock or accumulation of money immediately available for the purpose of being devoted to a specified end.

Nowhere in the act do its imperfections and want of uniformity more strikingly appear than in this connection.

By Section 27 it is provided that an employee of a direct compensator may, in case of injury, if the direct compensator fails to pay the compensation provided by the act, file his application with the commission for an award, which if allowed becomes a liquidated claim for damages to be collected by an action in the name of the state. If he does, however, it must be remembered that he waives the right to institute legal proceedings, even if the injury be the result of a wilful act or failure to comply with lawful requirements made for the protection of employees. But if the employee files an application with the commission for an award, he can only do so where the direct compensator fails to pay. There is no provision for an amicable adjustment of a dispute between the injured workman and his employer, or between dependents of the injured workman and his employer in

1915.]

Vayto v. Terminal & Ry. Co.

case of death, as to the amount of compensation. The only remedy the injured employee has in case of refusal or failure to pay, is to file his application with the commission; and, as has been said, this is tantamount to bringing a suit, and results in friction and the probability of discharge. The injured employee should not be placed in this position. All accidents and injuries should be reported immediately to the commission, and be promptly investigated by an agent of that body while the facts are obtainable and before they can be in any way colored or minimized by interested parties; and the commission itself should be empowered to require the direct compensator to comply with the provisions of the act within a specified time; and upon his failure to do so, the employee might then file his claim with the commission.

In Section 21 it is provided that every employee "shall be entitled to receive, either directly from his employer, as provided in Section 22 hereof, or from the state insurance fund," the compensation contemplated by the act. If the employee is to receive the compensation directly from the direct compensators, it is of course paid from money not in the fund and which the law does not contemplate should ever be in the fund.

Referring again to Section 27, it will be noticed that in case the direct compensator fails to pay, and the employee files an application with the commission, which hears and determines the issues involved, and if an award is made, suit may be brought on the award against the direct compensator in the name of the state, and judgment rendered against him or it for the amount as a liquidated claim for damages, together with an added penalty of fifty per cent.; and if judgment is rendered against the direct compensator, this judgment must be paid by the direct compensator, and is not paid from the state insurance fund. Hence it will be seen that the employee of such employer has no possible right to participate in the fund. The fund is not created or accumulated for him; he has no possible relation to it.

In *Hoozeboom v. Industrial Commission*, 24 C.C.(N.S.), —, this question was, we think, squarely before the court, except that the employer who caused plaintiff's injury was a non-contributor to the fund, and not a direct compensator. The plaintiff

iff filed his application with the commission under Section 27. The commission found the injury complained of was not sustained in the course of employment, and an appeal was taken, demurrer sustained by the court of common pleas, and error prosecuted to the court of appeals. Meals, J., rendered the opinion and held, substantially, that the act embraced "employers who do and who do not comply with the provisions of the act," and that "Section 43 of the act relates to the class of employers who have complied with the provisions of the act and contributed to the insurance fund created by the act."

It is true that direct compensators comply with the provisions of the act, but they do not pay the premium provided by the act. They are not contributors to the fund.

Section 23 provides that contributing and direct compensating employers "shall not be liable to respond in damages at common law or by statute law, save as hereinafter provided, for injury or death of an employee."

Proceeding now to the exception or reservation of the right of the employee to sue for damages, we find by Section 26 that any employer "who shall fail to comply with the provisions of Section 22 hereof shall not be entitled to the benefit of this act during the period of such non-compliance," and shall be liable in actions at law for injuries negligently sustained by their employees, and to such actions the defenses of the fellow-servant rule, assumption of risk and contributory negligence shall not be available to the employer. This section does not relate to the direct compensator, for to become such he must comply with the provisions of the act as provided for in Section 22.

By Section 29 the right to institute legal proceedings for damages is reserved to the employee against all classes of employers if the injury results from wilful act or failure to comply with any lawful requirement for the protection of the lives and safety of employees; but in such actions the employer may plead the defenses of the fellow-servant rule and contributory negligence. Whether the defense of the assumption of risk remains with the employer is at least doubtful. Upon the assumption that statutes in derogation of common law rights must be strictly

1915.]

Vayto v. Terminal & Ry. Co.

construed, it would seem that the right remains, as it is not expressly denied. Upon the theory that a wilful act, or a failure to comply with any lawful requirement for the protection of employees, places the employer outside of the scope of the act and denies him the rights guaranteed by the act, it would appear he is to be treated under these circumstances as if the act never existed; and unless the defense of assumption of risk is denied by the Norris act or other related statutes, it remains.

The last clause of Section 29 provides that if an employee makes application for an award or accepts compensation from a direct compensator, he waives his right to institute legal proceedings in any court, except as provided in Section 43; or if he institutes legal proceedings, he waives his right to an award from the fund, or direct payment from the direct contributor.

The plaintiff Schmidt, when he accepted compensation from his employer, then waived his right to institute legal proceedings of any kind in any court, unless this right is saved by Section 43. This section, as we have seen, denies the right of appeal in any case unless the final action of the commission denies the right of the claimant to participate at all in such fund; and not only that, but the right of appeal is still further limited and restricted to cases where the commission denies the right to participate at all in the fund, on the ground "that the injury was self-inflicted, or on the ground that the action did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right."

It is important that we bear in mind the phrase "in the course of employment" in constructing Section 43 or passing upon a finding of fact made thereunder by the commission. If, for instance, an employee receive an injury by which tissue is cut or broken so as to cause a flow of blood, and a week or two thereafter septicemia or blood poisoning results, the commission may properly find septicemia did not arise in the course of employment, but it may have been caused by unskillful surgical treatment or the negligence of the injured man in failing to properly care for the cut or injury, or in carelessly exposing the injured parts to septic contact.

The statute makes the finding of the commission on the question of course of employment final, and it can not be disturbed. Even if the contention of counsel for Schmidt is sound, that the money paid by his employer directly to him is by implication to be treated as part of the fund, it will be seen he was not denied the right "to participate at all in such fund," as he received and accepted compensation for fourteen weeks, or something over one hundred and fifty dollars. The precise amount we are unable to state, as it is not named in the petition. The claim is made, however, that Schmidt was denied the right to participate at all in the fund, for the reason that he was denied compensation for tuberculosis of the lungs, which it is claimed resulted from the injury. This raises the question of disease, which will be discussed later. All that is necessary to be said here is, that if Schmidt had tubercular trouble when injured, and the injury so aggravated the disease that death resulted, there might be much in the contention that the compensation allowed was wholly disproportionate to the consequences of the injury.

It was held in *Railroad Company v. Buck*, 96 Ind., 346, that "where injury is such as to render the system of the injured man liable to take on disease, and to so enfeeble the system as to make it less likely to resist the inroads of disease when it does set in, and death results, the death is, in legal contemplation, attributable to negligence. See also 61 Md., 74; 52 Wis., 150; 162 Ill., 448. But Schmidt did not die as the result of an injury aggravating an existing disease. The claim, however, is that the disease was brought on as a result of the injury.

The commission, by Section 43, is given full power to determine this question of fact; and as this decision is final, unless it denies a participation at all in the fund, under the limitations before mentioned, and as such denial was not interposed, we must conclude and hold its decision is final in determining that any present disability is due to causes other than an injury received in the course of employment. If, as a matter of fact, this man now has tuberculosis of the lungs, the commission may have found it existed prior to the injury, or is due to other causes, and the finding can not be disturbed.

1915.]

Vayto v. Terminal & Ry. Co.

Counsel for plaintiff cite *Police v. Industrial Commission*, 23 C.C.(N.S.), 433, in support of the doctrine contended for. In this case, Police made application for compensation for "double inguinal hernia." The commission found hernia existed, but that it did not result from injury received in the course of employment; however, seven dollars was awarded for aggravation of hernia. Grant, J., said, "The award was for a thing not asked for, and was in the nature of a voluntary act on the part of the commission," and therefore he was denied the right to participate at all in the fund for the injury of which he complained. The appeal was allowed, not only for the reason stated, but also because the award was so grossly disproportionate to the injury sustained as to amount to a denial of justice.

We are not prepared to say that the court may not allow an appeal if the compensation awarded is in fact a denial of justice. This, however, should so clearly appear as to leave no room for doubt. If, as a matter of fact, the industrial commission held that inguinal hernia, or hernia of any kind, is wholly due to some inherent weakness in the system, and is not due to strain, however suffered, which a man's employment requires him to exercise, we think the commission is wrong, and should give that subject further consideration. Causes of disease are predisposing and exciting. Even if there is an inherent weakness in a man's system, it can only be said to be a predisposing cause to a disease, and it may never develop unless there is interposition of an exciting cause; and if the predisposing cause or weakness is put in motion by a severe strain received in the course of employment, and an injury results, there is no reason for denying compensation.

In the Schmidt case the application was for compensation for an injury, and the compensation awarded was for disability due to the injury, and not for an aggravation of an existing disease. The finding was that the injury of September 4, 1914, arose in the course of employment. Compensation was awarded to December 18, 1914; and the commission held that the "disability subsequent to said date was not caused by said injury."

Under all the circumstances, the demurrer must be sustained.

The case of *Jacob Smith v. The American Steel & Wire Com-*

pany is before the court on demurrer to the petition. Plaintiff claims he was injured September 21, 1914, while in the course of employment for the defendant, by reason of the fact, as he avers, that a steam drop-hammer at which he was working was "loose and unsteady on its frame and supports, and because the base (anvil) on which the steel was placed was irregular and uneven on its surface and loose and wet from dripping water." The plaintiff was holding a piece of steel under the hammer on the anvil which, when struck by the hammer, because of the defects mentioned, was propelled with great force and violence against his leg and knee, causing the injuries of which he complains. It does not appear from the petition to which class of employers the defendant belongs, whether a non-contributor or a contributor to the fund, or direct compensator. This ought to be stated, as a different rule applies to two of these classes. If a non-contributor, the defendant can not avail itself or himself of the defense of the fellow-servant rule, assumption of risk, and contributory negligence. If the defendant is a contributor to the fund or a direct compensator, the action can only be maintained if the act causing the injury was wilful or if the injury arose from a failure to comply with some lawful requirement for the protection of the lives and safety of employees. If this is the ground upon which recovery is sought, the defenses of contributory negligence and the fellow servant rule are available to the defendant. But there is no lawful requirement for the protection of employees specifically relating to the conditions described in the petition. Nor is there any averment that the defendant or its officers failed to comply with any lawful requirement for the protection of the lives or safety of the employees. The basis of the action is, that certain appliances were in an unsafe and dangerous condition. There is an averment that the defendant failed to furnish the plaintiff a safe place in which to perform his work, and this raises an entirely different question.

Under the common law, an employer was bound to furnish a safe place or use ordinary care in that respect. By the act of March 18, 1913 (103 O. L., 95), furnishing a safe place by employers is made a statutory requirement. This is a supplemental

1915.]

Vayto v. Terminal & Ry. Co.

or related act to the compensation statute. It provides, among other things, that the duties of the state liability board of awards created by the compensation act, the duties of the commissioner of labor statistics, the chief inspector of mines, chief inspector of workshops and factories, and chief examiner of engineers, shall be performed by the industrial commission. It also provides that the commission shall have power to prescribe hours of labor, provide for safety devices and safeguards, and make and promulgate orders and general orders for the protection of the lives and safety and general welfare of employees; and these orders may become lawful requirements, under certain conditions, under the compensation act.

The policy of this act is to minimize accidents, protect the lives, limbs and health, and provide for the comfort, decency and moral well-being of all who labor for a living.

This act practically empowers the industrial commission to perform acts and duties similar to those performed by the Secretary of State for the Home department under the English compensation, factory and workshop acts. The similarity is in many respects striking, the commission, however, having greater powers as its orders and general orders are really legislative in character. An employer who is dissatisfied with an order may commence an action, under Section 38 of this latter act, in the Supreme Court, against the commission to vacate or amend an order on the ground that it is unreasonable or unlawful. Under the English act, when the inspector concludes premises are dangerous, he may apply to a court of summary jurisdiction for an order prohibiting the use of such premises until the danger has been removed. The Ohio statute seeks to accomplish the same result by giving an employee the right to bring an action in the Supreme Court to determine whether an order is unreasonable or unlawful. The Ohio statute is penal in character, and it does seem that acts criminal in nature ought to be clearly specified by legislative enactment.

Section 1027, General Code, provides in exact terms just what appliances, openings, shafts, stairways, cogwheels and machinery shall be guarded, and how guarded. It also provides how emery

wheels shall be operated. Under the act of May 6, 1913 (103 O. L., 819), providing for the prevention of lead poisoning among other things, the acts that are to be done and the appliances provided for are specifically named. This act provides in precise and exact terms how the manufacture of lead products shall be carried on.

Section 1300, General Code, specifically names the kind of machinery and occupations at which it shall be unlawful to permit a child under sixteen years of age to work; and as to exits, fire escapes, doors and floor space in workshops, they are in exact terms defined and provided for by Sections 1028-1 and 1028-2, General Code.

All these statutes are penal, as is the act of March 18, 1913 (103 O. L., 95).

If an employer should be arrested for violation of an order made by the commission in regard to premises, safety devices, or hours of labor, the constitutionality of the latter act, so far as it confers legislative power upon the commission, or the Supreme Court, may be seriously questioned. The Supreme Court of this state has never gone so far as to say that an act done in violation of a statute or ordinance is negligence *per se*, or that it even raises a presumption of negligence. *Hopple v. Parmlee*, 20 O. C. C., 303. This case is affirmed in the 66 O. S., 614, without opinion.

If this is true, it is difficult to understand how an order of the commission may become such a lawful requirement as to enable an employee to take advantage of the exception or reservation contained in Section 29 of the compensation act.

In *Variety Iron Works Co. v. Poak*, 89 O. S., 297, it is held, however, that failure to comply with an absolute and positive duty imposed by statute on owners of shops and factories is negligence *per se*. In the opinion, page 303, the court say: "The Legislature in positive terms has defined the duty of the employer in this respect."

And the cases of *Meek v. Pennsylvania Co.*, 38 O. S., 632, and *Jacobs v. Fuller & Huttenpiller Co.*, 67 O. S., 70, are not decisive of the question. The distinction seems to be that a statute

1915.]

Vayto v. Terminal & Ry. Co.

or an ordinance is ordinarily declaratory of the common law in many cases, and is not designed to enlarge it. Violation is not negligence *per se* in such cases, but the statute or the ordinance may go to the jury as tending to show negligence. But the violation of a statute conferring a new right in derogation of common law, and absolute and positive in its terms, is negligence *per se*. There seems to be a clear distinction between a statute positively providing that a saw or a cogwheel shall be adequately guarded, and a statute forbidding an automobile to run at a greater speed than fifteen miles an hour; for if a man's clothing is caught in the cogs of a rapidly revolving wheel or the teeth of a rapidly revolving saw, there can be no question as to the cause of the injury; while the man driving an automobile may negligently injure another even while going at less than fifteen miles an hour, and a jury might find a speed of five miles an hour excessive under certain circumstances. The proposition may be concretely stated by saying that the violation of a penal statute does not in itself necessarily furnish ground for a civil action unless the violation of the statute is the proximate cause of the injury complained of; that is, if the act which causes the injury is made unlawful by statute, then the violation of the statute is negligence for which recovery may be had in a civil action. And if the violation is that of an act which imposes an absolute and positive duty, and the injury results proximately from and because of the violation, it is negligence *per se*. Or, to state it differently—the omission or commission of a duty is not the foundation for an action unless it results in injury to one for whose protection the duty is imposed. *Erie Railway Company v. McCormick*, 69 O. S., 46.

Cooley on Torts (3d Ed.), 1399, perhaps states the law applicable under these circumstances.

“Where the statute imposes a new duty where none existed before, and gives a specific remedy for its violation, the presumption is that this remedy was meant to be exclusive, and the party complaining of a breach is confined to it. * * * So if the performance of a duty is enjoined under a penalty, the recovery of this penalty is, in general, the sole remedy, even where it is not payable to the party injured. But the rule is not without its

exceptions, for if a plain duty is imposed for the benefit of individuals, and the penalty is obviously inadequate to compel performance, the implication will be strong, if not conclusive, that the penalty was meant to be cumulative to such remedy as the common law gives when a duty owing to an individual is neglected."

As was said by the court in *Jacobs v. Fuller, etc., Co.*, 67 O. S., 67, at 75:

"The reason for this rule is that the injured party has a right to assume that the other party will obey the law, and has the right to govern himself accordingly, that is, in cases where the act complained of and which caused the injury is the very act which is made unlawful by the statute."

Sections 15 and 16 of the act of March 18, 1913 (103 O. L., 95), reads as follows:

"Section 15. Every employer shall furnish employment which shall be safe for the employees therein, and shall furnish a place of employment which shall be safe for the employees therein, and for frequenters thereof, and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes, follow and obey orders and prescribe hours of labor reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees and frequenters.

"Section 16. No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees or frequenters; and no such employer or other person shall hereafter construct or occupy or maintain any place of employment that is not safe."

It will be noticed that the provisions of these sections are general and declaratory, for the question as to what is a safe place or safe employment remains for judicial determination, as

1915.]

Vayto v. Terminal & Ry. Co.

does also the question as to kind and character of safety devices and safeguards to be used and the methods and processes to be employed. All these depend upon the circumstances of each particular case and situation. A workshop, factory, mine or other place of employment can, in the nature of things, be made no safer than is reasonably consistent with the practical operation of the business being there conducted. Any other rule would impose unbearable and unreasonable and destructive burdens and restrictions upon industry of all kinds. Indeed, this view seems to have been in the mind of the Legislature at the time the act was passed, for paragraph 11 of Section 13 provides:

“The term ‘safe’ and ‘safety,’ as applied to any employment or place of employment, shall mean such freedom from danger to the life, health, safety or welfare of employees or frequenters as the nature of the employment will reasonably permit, including requirements as to the hours of labor with relation to the health and welfare of employees.”

Whether a place is safe or dangerous depends largely upon how it is used. It may be said generally that if, from the character and condition of the place, a man of ordinary prudence would have reason to anticipate danger from its use, it is not safe within the meaning of the law. See *Atlantic Dock Co. v. Libby*, 45 N. Y., 499. The simplest appliance may be dangerous to a negligent and careless person, and the same is true of a place. A careless man may stumble over a chair in his own parlor and sustain injury. See *Barmore v. Railway Co.*, 85 Miss., 426.

In a recent case, *American W. M. Co. v. Schorling*, decided April 3d, 1915, by the Lucas County Court of Appeals, it appears that the defendant was a contributing employer, and that the plaintiff was engaged in removing a carload of lumber from a dry kiln. While passing by another car, the load of lumber upon the trucks shunted and caught him between the lumber and the wall of a building, causing an injury for which he brought suit. In his petition he alleged as negligence substantially:

1. Failure to furnish safe employment.

2. Failure to furnish a safe place.
3. Failure to provide and use safety devices and safeguards to prevent the lumber from falling.
4. Failure to use methods and processes reasonably adequate to render the employment and place safe.

It will be seen that the acts of negligence charged are those mentioned in Sections 15 and 16 of the act of March 18, 1913 (103 O. L., 95). A demurrer was interposed to the petition in the court of common pleas, and overruled. The court of appeals held this was not error, and that the acts of negligence charged brought the case under the exception of Section 29 of the compensation act.

This decision, if good law, extends the "lawful requirement" exception to safe place and safe employment, safety devices, safeguards, and methods and processes reasonably adequate to render the employment and place of employment safe. This is going far, but as the doctrine is along the line of the general policy of the compensation act, and in the interest of humanity, we think it should be followed, at least until overruled by the Supreme Court. It does strike one, however, that, under the statement of facts, the doctrine of assumption of risk ought to be available to the employer. It will also be noticed that the doctrine of fellow-servant rule, which was available, might have been interposed to prevent recovery; for, if the lumber was negligently piled upon the trucks by a fellow servant, no recovery should have been allowed.

So it will be seen that there remains the question of what specific acts of omission or commission on the part of the employer constitute a failure to comply with lawful requirements so as to bring an employee within the exception or reservation under Section 29 of the compensation act; and this, we take it, must be determined by the court under the facts in each case. Of course, one employer, in the absence of a special order promulgated by the commission, can not be expected to use greater care than others in the same business under like circumstances; hence, only ordinary care will be expected in respect to these requirements; and the doctrine of *Cincinnati, etc., Ry. Co. v. Frye*, 80 O. S., 289, must be applied and that is—

1915.]

Vayto v. Terminal & Ry. Co.

“The employer is not an insurer or guarantor of the absolute safety of the place of work, but the limit of his obligation and duty in that behalf is to exercise reasonable and ordinary care, having due regard to the hazards of the service, to provide an employee with a safe place in which to perform his work.”

It can not be held, without absolute danger to all industry, that an employer is an insurer of the place of employment, the safety of the employment, and safety devices or safeguards, unless they are specifically named, or the methods or processes employed unless they are specifically named by statute, for to so hold would be equivalent to saying that all industry should cease and all shops and factories close. If every act of negligence is to be held as a failure to comply with lawful requirements for the protection of the lives and safety of employees, so as to bring practically every injury within the exception or reservation of Section 29 of the compensation act, then the act has failed of its purpose and should be repealed at the first opportunity.

In the case of *Smith v. The American Steel & Wire Co.*, now before us, it can not be said from the allegations in the petition that the place of employment was unsafe. If the plaintiff has a cause of action at all, it is because the employment at which the plaintiff was engaged when injured was not safe, or that there was a failure to use methods and processes reasonably adequate to render the employment safe; and under the facts as they may appear at the trial, the trial court will have to be the judge as to these matters.

The demurrer will be sustained.

Another case now before the court involves a very peculiar question. The plaintiff claimed that he was sent by his employer to a different place from the shop or factory to perform certain work, and while at the place designated, he was assaulted by a former employee of the employer who had been discharged or had voluntarily quit his employer by reason of a strike. The matter came before the court on a motion to make more definite and certain, which motion was granted for the reason that the court believed the plaintiff should state all the facts in the case so that a demurrer might be interposed.

The employer was a contributor to the fund. This case involves the question, is an employer liable to an employee for the malicious acts of a third person while in the performance of his duty? In this case the employee evidently was, at the time he was injured, in the course of employment.

While paragraph 1 of Section 13 of the act of March 18, 1913 (103 O. L., 95), makes the place of employment ambulatory, it is still only declaratory of the common law, for the place of employment always meant the place where the servant was directed to do or perform his work or where he was performing it. It is charged in the petition that the defendant knew the plaintiff would be assaulted and injured; but even if this is true, it is still not a wilful act unless the employer sent the plaintiff to the place purposely and with the direct object of having him assaulted. This is in effect the meaning of the amendment to Section 29 found in 104 O. L., 194. We are aware of no statute that requires an employer to send a guard or police officer with an employee sent from the shop to work temporarily at another place. If a man or pumber of men break into an employer's factory or shop and assault his workmen, can it be said the place is not safe within the meaning of the law?

If the employer may not, under Section 29 of the compensation act, plead assumption of risk in this case, still the doctrine of *volenti non fit injuria*—no wrong arising to one consenting—does apply. Assaults are not risks incident to a business within legal contemplation, unless committed by the employer; and, under the compensation act, such an assault would then be a wilful act, but even then it can hardly be said that the man, at the time he was assaulted, was in the course of employment, for if an employer assaults one of his workmen, he can not in any sense be then said to be an employer. A criminal act can not be a risk incident to a lawful business, but if men take the place of other men on strike, they consent to the dangers growing out of that situation. The plaintiff must be held to have known that there was a labor difficulty between his employer and his former employees. He knew as much about that situation as the employer; and as the employer may plead contributory negligence under Section 29 of the compensation act, we can see no possible

1915.]

Vayto v. Terminal & Ry. Co.

grounds for recovery. Suppose no strike existed in this case, and that the plaintiff was assaulted by some stranger at his work, could he recover from the employer? If not, will a mere allegation that the employer knew, when he directed him to go to that work, that he would be assaulted, state a cause of action within the exception of Section 29 of the compensation act? If the act is a wilful act, yes; if not, no; and we have seen that such an act is not wilful unless the employer directed the employee to go to the place purposely and with the direct object that the assault would be committed. It is not enough or sufficient to constitute a wilful act that the employer had in contemplation the assault as a possible result of the service, for under the compensation law, a wilful act is nothing less than a criminal act, and such is not alleged in this petition. The only lawful requirement for the protection of citizens from assaults is that incumbent upon the civil authorities. A common carrier is required to exercise the highest degree of care for the protection and safety of its passengers, but so far as protecting them from assaults and abuse by strangers is concerned, the law is well settled.

It is said in *Elliott on Railroads*, Volume 4, 2d Edition, Section 1591b, that:

“It may be said generally that a carrier is not, as to its passengers, charged with negligence in attempting to operate its cars during a strike of its employees, unless the conditions are such that it ought to know or ought reasonably to anticipate that it can not do so and at the same time guard its passengers from violence by the exercise of the utmost care on its part.” Citing 83 Minn., 237, and other cases.

The same authority says it is to be understood that a carrier is not a guarantor of the safety of its passengers under all circumstances. See Section 1591.

The mere fact that the employer knew that some of his former employees might interfere with his workmen does not necessarily imply that a workman sent out to perform work at another place would be assaulted. We think the allegations in this petition are not sufficient to state a cause of action. That the plaintiff may have a cause of action if the conduct of the employer is charged

to be wilful, and that fact is proven, we are not deciding. To hold this defendant, under all these circumstances, would require us to hold that he is the insurer of the safety not only of the place where his employees worked, but of the whole city of Cleveland, because the employee sent out was in the course of employment while going from the factory to the place where he was directed to go, and it can not possibly be held that the employer was the insurer of the street, the street railway cars, or whatever conveyance the employee may have taken to reach the place where he was directed to go.

The demurrer will be sustained.

In a motion to strike out certain averments in a petition, the question, Is disability from occupational or industrial disease an injury within the meaning of the compensation act and related acts? is directly presented. The title of this case is not given, for the reason that the pleader, instead of alleging failure to furnish safe employment or the failure to comply with lawful requirements, or to use methods and processes reasonably adequate to render the employment and place of employment safe, stated in general terms and quite voluminously that the plaintiff was disabled by reason of conditions described.

All of Section 1 of the act of May 6, 1913 (103 O. L., 819), and all of Sections 15 and 16 and much of Section 13 of the act of March 18, 1913 same volume), are set forth verbatim in the petition. We found it impossible to strike out, and leave any averment stating a cause of action in the petition. We therefore treated the motion to strike out as a demurrer and sustained it.

One David Brown, an employee of the Eagle White Lead Company of Cincinnati, made application for an award for compensation to the state liability board of awards in September, 1913, claiming that he was disabled on August 26, 1913. His duty was to charge and draw kilns used in the manufacture of white lead, and he claimed that in the performance of this duty he was taken sick with lead colic and was confined in a hospital until September 26, 1913. The Eagle White Lead Company employed more than five workmen regularly in its business and was a contributor to the fund. The industrial commission, successor of the

1915.]

Vayto v. Terminal & Ry. Co.

state liability board of awards, disallowed the claim for compensation January 2, 1914, for the reason that the disease was not an injury within the contemplation of the law of the compensation act of June 15, 1911. An appeal was taken to the common pleas court. It will be noticed that the claim arose under the compensation act, as has been said, of June 15, 1911, and Brown's disability arose before the act of May 6, 1913 (103 O. L., 819), went into effect, as that act did not go into effect until October 1, 1913. This latter act, by its title, is "An act for the prevention of occupational diseases with special reference to lead poisoning" and does in positive terms prescribe "Lawful requirements for the protection of the lives and safety of employees engaged in the manufacture of that product." So it will be seen that the question before the common pleas court on the appeal was to hold or not to hold that lead poisoning was an injury within the scope or meaning of the compensation act of June 15, 1911. The court held it was an injury. See Volume 12, Ohio Law Reporter, May 16, 1914. In this the court was sustained by the Hamilton County Court of Appeals, Volume 12, O. L. R., January 23, 1915. Both opinions show much learning and careful research. We think, however, that the doctrine of liberal construction is carried in these decisions to the extreme limit in advancing the remedy by including cases without the letter, but possibly within the reason of the statute. As we have seen, the policy or *raison d'etre* of the workmen's compensation act is to advance the public welfare by minimizing accident and personal injury litigation and to tax industry for the purpose of directly compensating those who are injured and the dependents of those killed in its pursuit. That those who are disabled by occupational or industrial diseases should be compensated as well as those sustaining bodily injury, can not be denied. Recognizing this undeniable fact, the framers of the Constitutional Amendment of September, 1912 (Section 35, Article II), gave the Legislature power to provide "Compensation to workmen and their dependents for death, injury or occupational diseases occasioned in the course of such workmen's employment." But nowhere in the compensation act subsequently passed March 14, 1913, are the words "occupational disease"

mentioned. It would seem that where a grant of power to do two or three separate and distinct though cognate and related things is given the Legislature, and the grant is exercised in relation to only one or two of these things and is ignored as to the third, that the Legislature refused to exercise the power as to the thing ignored. Just why the Legislature failed to provide compensation in express terms for the victims of occupational disease is difficult to understand. We can only say it is one of the inefficiencies indicating the incompleteness and want of harmony so strikingly noticeable when the act is carefully read.

In re Hurle, 104 N. E., 336, is cited by the common pleas court and Court of Appeal of Hamilton County in support of the contention that disease is an injury. In that case compensation was allowed under the Massachusetts Compensation Act for loss of vision resulting from an acute attack of optic neuritis caused by coal tar gases, but the facts show that the noxious gases were thrust into the face of the disabled workman, and the disability did not arise from slow and gradual absorption of poisonous substances. Even in the *Brown* case, decided by the common pleas court and the court of appeals, it appeared *Brown* was suddenly taken with lead colic while at work. There are some occupational diseases that are undoubtedly injuries, such as caisson disease, which results from an injury to bodily tissue owing to a too rapid locking out or release of air pressure; but to say that an occupational disease where no lesion occurs, and which may be developing for years before disability takes place, is an injury is substituting judicial construction for legislation, and this is an exceedingly dangerous exercise of judicial power.

The word injury in its legal signification may mean any unlawful act in derogation of another's right, but there is a clear distinction between injury in this sense and personal injury as that phrase is generally understood. Injury in the latter sense means a hurting or wounding which does not result in death (*Williams v. State*, 2 O. C. C., 292). Personal injury is an injury to the person, as an assault is distinguished from an injury to property (*Terre Haute Railroad Co. v. Lauer*, 52 N. E., 703; 21 Ind. App., 466). In an accident policy it is held to mean bodily injury. *Theobald v. Railway Passenger Assurance Co.*, 26 Eng. L. & Eq., 432.

1915.]

Vayto v. Terminal & Ry. Co.

Disease is defined to be any derangement of the function or alteration of the structures of the animal organs, or a morbid condition resulting from some functional disturbance or failure of the physical functions which tend to undermine the constitution. *Peterson v. Modern Brotherhood of America*, 161 N. W., 281-291; 125 Ia., 562. See 67 L. R. A., 631.

There are many occupational diseases which fall directly within this definition, and can in no sense be termed personal injuries.

In the English Compensation Act, the word accident is used as well as the word injury. English courts divided upon the question whether occupational disease was included in these terms; and in consequence of this disagreement between the courts, the act was amended so as to specifically include certain occupational diseases. The general terms of the act are not changed by the amendment, but the amendment provided for compensation "as if the disease * * * were a personal injury by accident arising out of and in the course of that employment."

In reading those decisions which hold that occupational disease is an accident or injury, we are struck with the fact that the warp of the reasoning is much finer than the woof of the argument. We are not finding fault with the decision in the *David Brown* case, as such decisions are humanitarian in character and in consonance with the general policy of compensation acts; but the Legislature should not thrust upon the court a duty which it negligently or for other reasons failed to perform.

We trust the industrial commission will prepare for submission to the next General Assembly an efficient compensation act consistent, complete and harmonious, embracing all that is good in the several acts now in force, including occupational diseases as injuries or accidents, and eliminating absurdities and crudities now so apparent, so that its construction and enforcement will be a pleasure to the commission and to the courts.

The case of *Berry v. The Ideal Paper Box Company* is also before the court on demurrer. When Berry was injured he was a minor of about nineteen years of age, but was *sui generis* at

the time he brought this action and is suing in his own name. He says defendant employs regularly more than five workmen in his business, and that it is a subscriber to the state insurance fund. He says further that he filed an application with the state liability board of awards, and was awarded compensation in the sum of \$53.30; but he claims that when he received this sum he was a minor, and did not know the nature and extent of his injury; that he is now dissatisfied with this award, and repudiates and disaffirms the action taken in obtaining it.

When this award was made, the act of June 15, 1911, was in force. If the case arose under the present compensation act, there would be no difficulty in the premises, for by Section 46 of this act it is provided that "a minor working at an age legally permitted under the laws of this state shall be deemed *sui juris* for the purpose of this act; and no other person shall have any cause of action or right of compensation for an injury to such minor workman. But in the event of an award of a lump sum of compensation to such minor employee, such sum shall be paid only to the legally appointed guardian of such minor."

We think it quite clear that the general purpose of the first act, or the act of June 15, 1911, in this regard is practically to the same effect, for under Section 21-2 it is provided that "every employee who makes application waives his right to exercise his option to institute proceedings in court."

This provision seems to be not limited. There is no contention but that at the time Berry was injured he was a person "of an age legally permitted under the laws of this state" to work in factories or workshops.

By Section 35 of the act of June 15, 1911, it is provided that the benefits or compensation arising under the act "shall be paid only to the employees or their dependents." In cases under the workmen's compensation act of England this question arose, the act being silent upon the question here involved. In *Neale v. Electric & Ordnance Company*, 2 K. B., 558-566 (1906), it appears that an infant brought suit by his next friend, and afterwards applied for compensation under the workmen's compensation act. The court said:

1915.]

Vayto v. Terminal & Ry. Co.

“The question here is, not as to the validity of a contract made by an infant, but as to his estoppel by reason of proceedings taken in an action. I can not see any ground for the suggestion that the plaintiff, because he is an infant, is in any other or better position than that in which an adult would have been in an action in which he was plaintiff had it resulted in the same way as the action in the present case.”

The same view was taken by English courts in other cases.

In a case recently decided by the Supreme Court of this state it appears that one William Zilch, a minor, by his next friend, brought an action against one Baumgartner in the court of common pleas, claiming that he sustained an injury on the 6th of June, 1913, which was due to the negligence of the defendant in failing and neglecting to guard a circular saw, which, as has been seen, is made an absolute and positive duty by Section 1027, General Code. It appears from the record—and this is uncontradicted—that the plaintiff, a few days after he received the injuries complained of, made up and signed and sent to the state liability board of awards an application for compensation as provided in the compensation act. It is provided by the rules of the board (now commission) that should an applicant fail to prosecute his application as prescribed by the rules within two weeks after giving notice, the Board may consider that such injured person has waived his right to compensation and make a finding accordingly, which in this case the board did and disallowed the claim. The fact, however, that an application had been filed for compensation under the act was pleaded as a defense in the court of common pleas, but was disallowed by the court, and a judgment was rendered, which was reversed by the court of appeals [19 C.C.(N.S.), 438] for the reason that the plaintiff had waived his right to institute legal proceedings by filing his application with the board. The Supreme Court held, in a per curiam [91 Ohio State, 205], that the State Board of Liability Awards was not warranted in holding that the plaintiff had waived his right to compensation from the insurance fund, in accordance with their rule 9; but the court also held that, having made this application for compensation from the insurance

fund, the plaintiff waived his right to exercise his option to institute legal proceedings in court; and the judgment of the court of appeals in reversing the judgment of the court of common pleas was sustained and upheld.

The record in this case clearly shows that the question of minority was before the court of appeals and before the Supreme Court, and the holding under the circumstances that the plaintiff waived his right to institute legal proceedings by filing his application for an award from the state insurance fund must be considered as decisive on the question that, even under the law of June 15, 1911, a minor of an age legally permitted under the laws of this state to work in factories and work-shops is *sui juris*, and therefore the demurrer will be sustained.

Skof v. Victor R. Brown Company is before the court on a motion to strike out an allegation that the employer had not availed itself of the provisions of the workmen's compensation act by paying the premiums as provided in the statutes of the state of Ohio.

This question was before the Superior Court of Cincinnati May 19, 1913. See 12 O. L. R., 575. Pugh, J., said:

"An allegation that the defendant employs five or more workmen in the same business and has failed to subscribe to the state insurance fund for injured employees, sets out facts showing that the defendant is subject to the provisions of the workmen's compensation act, and will not be stricken out as irrelevant."

It must be remembered that there are at least three classes of employers; first, those who do contribute to the fund; second, those who do not; third, those who are direct compensators; and possibly a fourth, those employing less than five workmen who do contribute to the fund. The remedy is different as to some of these classes, as has been pointed out. If an employer is not a contributor to the fund, an action may be instituted as if the act did not exist; and not only that, but the employer is denied the defenses of the fellow-servant rule, contributory negligence, and assumption of risk; while if an employer is a contributor or is a direct compensator, then no action can be instituted against him

1915.]

Meeks, Admr., v. Ryan.

unless the cause of action or the injury is the result of wilful act or failure to comply with a lawful requirement for the protection of the lives and safety of employees. So that it will be seen that allegations of the kind in the Skof case are material and ought to be pleaded, and the motion to strike out will be denied.

The words "purposely self-inflicted" mean precisely what the words in the ordinary sense imply, and that is, that the man intentionally and purposely injured himself in order that he might recover compensation or damages. This, of course, does not include cases of suicide. The purposely self-inflicted injury in this sense is the same, by analogy, as the case of a soldier who purposely wounded himself that he may avoid battle or receive a pension. A man's negligence may be so gross that it may be said to be wilful; still, if the injury is not self-inflicted for the purpose indicated, it is only negligence, no matter how reckless or gross it may be.

**DOCTRINE OF RESPONDEAT SUPERIOR CAN NOT BE
BASED ON RELATIONSHIP.**

Superior Court of Cincinnati.

WILLIAM H. MEEKS, ADMINISTRATOR, v. A. J. RYAN.

Decided, November 9, 1915.

Negligence—Owner of an Automobile Operated by His Step-son—Not Liable for Wrongful Death Caused by Careless Handling of the Machine, When—Application of the Doctrine of Respondeat Superior.

1. The mere relation of father and son, or of step-father and step-son, is not of itself sufficient to make the son the servant of the father within the meaning of the doctrine of *respondeat superior*; and this is true even though the step-son is a member of the step-father's household.
2. Where an adult step-son, living in the household of his step-father, was negligently operating his step-father's automobile, the latter will not be liable in damages for an injury unless it appears that at the time of the mishap the step-son was engaged in carrying out some purpose of the step-father and was thus acting as his servant or agent.

DeCamp & Sutphin and Gregor B. Moormann, for the demurrer.

Wm. F. Fox and Robert S. Alcorn, contra.

OPPENHEIMER, J.

Wm. H. Meeks, as administrator of the estate of Doris Meeks, deceased, filed this action against A. J. Ryan, claiming damages for the alleged wrongful death of his decedent.

The allegations of the petition indicate that at the time when plaintiff's decedent met her death, she was being driven by Barton Rogers, defendant's step-son, in an automobile which was also occupied by others, friends of Barton Rogers, whom he had invited to ride. Defendant, the owner of the machine, was not in the car at the time of the mishap. Plaintiff alleges, however, that defendant had purchased the automobile solely for the use of himself and the members of his family, and that Barton Rogers at the time resided with defendant as one of the members of his household; that Rogers was permitted by defendant to use the machine whenever he desired, for his own pleasure and that of his friends, and that at the time of the mishap Rogers was using it in pursuit of the general purposes for which defendant had purchased the automobile.

Appended to the petition are a number of interrogatories, the purpose of which is to ascertain the truth of the allegations contained in the petition. The petition is manifestly drawn upon the theory that defendant, by reason of the ownership of the machine, and of the permission which he had given to Barton Rogers to use it, is directly liable to plaintiff. It is admitted that Barton Rogers was, at the time of the mishap, an adult. Defendant's liability can arise solely out of the doctrine of *respondet superior*. Defendant can not be held merely because of the ownership of the instrumentality which produced the injury of which plaintiff complains. Nor does the mere fact that defendant was the head of the household in which Rogers resided make him liable. The parent is not, as such, liable for the torts of his adult child, and assuredly the step-father can not be held liable, merely because of his relationship, for the delicts of his step-son. If defendant is to be held at all, it must be shown

1915.]

Meeks, Admr., v. Ryan.

that at the time of the mishap Rogers was the agent or servant of defendant, and that he was driving defendant's car in that capacity.

We can find nothing in the allegations of the petition which justifies this conclusion. The use of defendant's car was at most permissive. Even though Rogers took defendant's car with his knowledge and consent in pursuance of a general authority to use it whenever he desired he was not in the pay of defendant; he was not performing any work for the defendant; he was not even carrying other members of defendant's family or household in the car. He was pursuing his own purposes solely, without any direction from or control by defendant, and there is absolutely no theory of law which in our opinion will authorize the holding of defendant. Plaintiff's counsel has argued earnestly and ably that defendant should be held because he had reason to know of Rogers' negligent habits and because, if he had not permitted Rogers to use the car the mishap would not have occurred. Public policy, they therefore assert, requires the holding of the defendant to accountability for Rogers' act. We recall the statement made several centuries ago by one of England's greatest jurists that "public policy is an unruly horse, and when you are once astride him, there is no telling where he may carry you." Liability for damages must necessarily arise out of some recognized legal principle, and not out of a mere feeling that defendant is morally responsible for a mishap. And as we have just stated, we find no principle of law recognized by the courts of this state which will support the plaintiff's contention. Even if Rogers had at any time been the servant of defendant, employed by him for the purpose of operating his car, yet if this act were done by Rogers when at liberty from defendant's service, and pursuing his own ends exclusively, defendant would be free from all legal responsibility, even though the injury complained of could not have been inflicted without the facilities afforded to Rogers by his relation to defendant. *Shearman & Redfield Neg.*, Section 147.

A review of the authorities compels the conclusion at which we have arrived. Similar to the case at bar are the cases of *Doran v. Thomsen*, 76 N. J. L., 754; *Maher v. Benedict*, 123 App. Div.

(N. Y.), 579; *Roberts v. Schanz*, 83 Misc. (N. Y.), 139; *Towers v. Errington*, 78 Misc. (N. Y.), 297; *Linville v. Nissen*, 162 N. C., 95; *Reynolds v. Buck*, 127 Ia., 601; *Parker v. Wilson*, 179 Ala., 361. The same theory seems to underlie the cases of *Long v. Nute*, 123 Mo. App., 204; *Cullen v. Thomas*, 150 App. Div. (N. Y.), 475; *Lotz v. Hanlon*, 217 Pa., 339; *Neff v. Brandeis*, 91 Neb., 11, which hold that in an action for damages against the owner of an automobile who was not present at the time of the mishap, the burden of proof is upon plaintiff to show that the person in charge of the machine was defendant's servant, and that he was at the time of the mishap engaged in the master's business or pleasure.

And the converse of our thesis is found in the case of *Smith v. Jordan*, 211 Mass., 269, in which defendant was held liable for an injury resulting from the negligent use of his car by his son. But the court states (p. 271):

"The boy was not running it (defendant's automobile) for any purposes of his own, but for the convenience of his mother and by her express direction, for whose use in common with the rest of the family it had been purchased by his father. * * * This is not a case of mere permissive use of the father's vehicle by the son for his own purposes."

The authorities cited by defendant are for the most part entirely consistent with the view we have taken. Thus in *McNeal v. McKain*, 33 Okla., 459, the court refuses to give its sanction to the broad rule laid down in *Daily v. Maxwell*, 152 Mo. App., 415, that the parent will be liable for an injury caused through the negligence of a son (in that case a minor) where the son is driving the parent's motor car solely for his own pleasure, and not having in it either members or guests of the father's family. In *Bourne v. Whitman*, 209 Mass., 155, it appears that the son was the regularly employed chauffeur of the father, and that the father had himself given directions as to the use of the machine at the time of the mishap.

In *Ploetz v. Holt*, 124 Minn., 169, it was alleged that the son who was in charge of the car at the time of the mishap was actually in the father's employ. The court held that there was

1915.]

Meeks, Admr., v. Ryan.

sufficient evidence to require the question of the defendant's responsibility to be submitted to the jury; but it sustained a charge of the court that "if the purpose of taking the automobile by Neil Holt (the son) was simply to serve the pleasure of himself and his brother, who, it would appear, was past majority in years, L. J. Holt (the father) would not be bound." In the case of *Stope v. Morris*, 147 Ky., 386, the plaintiff, a child twelve years of age, was run down by an automobile owned by defendant and operated at the time by his son who was taking a sister and some visiting ladies on a pleasure trip. The liability of defendant was predicated by the court directly upon the proposition that the son must, for the purposes of suit, have been regarded as the father's servant.

There are several cases in Missouri which seem to bear out defendant's contention. These are the cases of *Daily v. Maxwell*, *supra*; *Marshall v. Taylor*, 168 Mo. App., 240, and *Hays v. Hogan*, 180 Mo. App., 237. These decisions are all based upon the theory that a member of the owner's family, when driving his car with his consent, express or implied, must be considered as using the car for his purposes. In the last case, however, Judge Sturgis in a well-considered opinion, throws much doubt upon the propriety of the court's decision, and certifies the case to the Supreme Court for final determination. We have been informed by the clerk of the Supreme Court, however, that the case will not be reached for approximately two years, so that we can not hope for any speedy determination by the courts of Missouri of the question involved. And as these cases seem to be in conflict with the principles so long generally recognized by the courts of this country, we do not feel constrained to follow them.

We find no case directly in point in this state. Two cases recently decided by the Supreme Court shed some light upon the question. In the case of *Coal Co. v. Rivoux*, 88 O. S., 18, it appeared that an employee of defendant, while driving an automobile belonging to defendant without authority, for his own purposes, struck and killed plaintiff's decedent. The court says (p. 25):

"It was incumbent upon the plaintiff below to establish, by a preponderance of the evidence, that he (the chauffeur) was acting within the scope of his employment."

And the court further says (p. 32):

"But this court is not in accord with the authorities which hold that a *prima facie* case of negligence is made against a defendant upon the mere showing that he was the owner of the negligently operated automobile. * * * Nor do we think that proof of the additional fact that the operator was an employee of the owner raises a presumption of negligence against him unless it appears that the duties of the employee are in connection with the automobile or that he was operating the same with the authority—express or implied—of the owner."

In *Rawson v. Motor Works*, 20 C.C.(N.S.), 182 (affirmed without report in 90 O. S., 469), it appeared that plaintiff's decedent was killed by an automobile which was negligently operated by an employee of defendant, who had, contrary to instructions, used the automobile for his own pleasure. The court not only holds that the owner is not liable for the negligent act of an employee who is not at the time engaged in the performance of his duties as such employee, but further states that the automobile is not a dangerous agency within the meaning of 47 O. S., 387.

We are therefore of opinion that the demurrer to the petition and the interrogatories attached thereto should be sustained.

1915.]

Meyer, Administratrix, v. Flannery.

**ACTION AGAINST A DRUGGIST FOR WRONGFULLY
CAUSING DEATH.**

Common Pleas Court of Hamilton County.

CATHERINE MEYER, ADMINISTRATRIX, v. JAMES E. FLANNERY.*

Decided, April 13, 1915.

Action for Wrongful Death—Third Person Permitted to Testify that He had Purchased the Same Drug Shortly Before—And that No Injurious Results Were Manifested from its Use—Instructions to Jury as to the Exercise of Ordinary Care—Charge of Court—As to Preponderance of Evidence.

1. An action against a druggist for wrongfully causing the death of the plaintiff's decedent by reason of selling to the son of the decedent a package of Rochelle salts containing cyanide of potassium where the defense is that the cyanide of potassium was not in the package containing the Rochelle salts at the time of its delivery, it is not error for the court to permit a third person to testify that he had purchased Rochelle salts shortly before and that no injurious results were manifested from the use of same.
2. It is not error for the court to instruct the jury that the druggist is bound to use ordinary care in and about the conduct of his business so as not to cause injury to persons buying by failing to give the drug asked for and giving instead some other drug or drugs which would be likely to cause injury and to further instruct the jury that if the druggist failed to give the drug asked for, but instead gave the drug asked for together with some other drug of dangerous properties, why then that would be failure to exercise ordinary care for which a recovery might be had in case of death resulting therefrom.
3. Where the court in his general charge to the jury uses the expression, "satisfy you by a preponderance of the evidence," and then explains in detail what he means by a preponderance of the evidence by submitting to the jury the familiar example of balancing the evidence as upon a pair of scales, and an examination of the entire record shows that the jury could not in any way have

*Affirmed by the Court of Appeals, without opinion, February 8, 1916.

Meyer, Administratrix, v. Flannery. '[Vol. 18 (N.S.)

been misled by the use of the expression, the expression so used will not constitute such prejudicial error as would justify a court in setting aside the verdict, where it otherwise appears that the case has been fairly and impartially tried and submitted to the jury. (C., H. & D. Ry. Co. v. Frye, 80 Ohio St., 289, distinguished.)

Dempsey & Nieberding, for the motion.

Darby & Benedict, contra.

GEOGHEGAN, J.

Heard on motion for a new trial.

This action was brought by the plaintiff, as administratrix of the estate of Joseph F. Meyer, deceased, against the defendant for negligently causing the death of said Joseph Meyer, the claim being based upon the fact that the defendant, who is a druggist, sold to the son of the decedent a package of Rochelle salts which contained a dangerous poison, cyanide of potassium, instead of selling Rochelle salts simply as he had been requested. The case was tried before a jury and resulted in a verdict for the defendant.

Three grounds are set out why the verdict of the jury should be set aside and a new trial granted; and I will take up these grounds in the order that they are alleged to have occurred during the trial of the action.

1. The court permitted a certain Hoffman to testify that on the afternoon of the day in question he had purchased Rochelle salts from the drugstore of the defendant and had administered them to his two and a half year old child and that they had no effect upon the child other than to accomplish the purpose for which they had been administered to the child. There was evidence tending to show that the Rochelle salts sold to Hoffman came out of the same bottle as those that were sold to the son of decedent and that they were purchased by Hoffman about two o'clock in the afternoon, just four hours before the sale to the son of the decedent.

Counsel for the plaintiff claims that this transaction was *res inter alios acta*.

1915.]

Meyer, Administratrix, v. Flannery.

I can not agree with this view. I can not see by what rule of law testimony to the effect that another person had taken the compound which was alleged to have caused the death of the plaintiff's decedent and suffered no serious effects therefrom, should be excluded, especially where the defense is that if cyanide of potassium were in the Rochelle salts at the time they were taken by the decedent it was placed in there between the time of the sale and the time of the taking of the drug by the decedent.

In the case of *Cameron v. Dow*, recently tried in the superior court, Judge Pugh, after much consideration, admitted testimony to the effect that there had been no complaint with reference to the Epsom salts sold by the defendant other than that made by the plaintiff. He admitted this testimony as tending to support the defendant's theory of the case that the arsenic was not in the salts at the time they were handed to the plaintiff or her agent. There does not seem to be any difference in principle between the two cases.

2. The second ground of error is that the charge was misleading as laying down two different rules of care.

I have examined this charge very carefully, in view of the criticism made upon it by learned counsel for the plaintiff, and have been unable to see that the criticism that he makes with reference to this portion of the charge is really well taken.

The court, at page 6 defined what negligence and ordinary care meant after the manner set out in the various text-books and legal literature upon the subjects, and then at page seven used the following language:

"Ordinary care requires of a person engaged in the business of selling drugs for immediate use by persons who may resort to his store for the purchase of same, to so conduct himself in and about the business as not to cause injury to persons buying those drugs by reason of the failure to give the drug asked for and the giving instead of some other drug or drugs which would be likely to cause injury. And, if the said person fails to exercise ordinary care in this respect and as a result of his failure to exercise ordinary care, injury or death is caused to the person

using the said drugs, then said person selling the drugs is liable for the said negligence."

And on page eight the court practically charged the jury that if the defendant, through his agent, delivered to the son of the decedent a mixture of Rochelle salts and a poisonous drug called cyanide of potassium and that as a direct result the death of the decedent ensued, plaintiff would be entitled to recover.

Counsel for the plaintiff seems to think that this laid down two standards of care and the jury might be misled in believing that in one portion of the charge the court was instructing the jury that the care required of the druggist was the care required of an ordinary man of the street and in another part that the druggist was required at all events to give the medicine asked for and if he failed to do so he would be liable for damages notwithstanding he used the highest degree of care.

This charge can not bear that construction. The court charged the jury that the defendant was only liable if he was negligent; that negligence was the failure to exercise ordinary care; that ordinary care depended upon the circumstances of the particular transaction, and that in the case of a druggist selling drugs it required of him to give the medicine asked for and not some other medicine likely to cause injury. This seems to me to state correctly and in logical order those things upon which the ultimate issue of the case turned; and it seems to me that the twelve ordinary men of the jury could not have been misled by the court's charge, but they understood perfectly and it was repeated that if Flannery sold the poisonous drug at the time he was not in the exercise of ordinary care and therefore if his selling of the drug was the proximate cause of the death of plaintiff's decedent, he would be liable, and the jury perfectly understood that there was only one question before them in the case and that was whether or not Flannery did sell the drug with the poison in it.

I have read carefully the case of *Willson v. Faxon*, 208 N. Y., 108, and think the charge given in the case at bar thoroughly

1915.]

Meyer, Administratrix, v. Flannery.

consists with the rule laid down in that case. At page 114 the court says:

“The negligence which must be established to render a druggist liable in such a case as this is measured by his duty; and while this is only to exercise ordinary care, the phrase ordinary care in reference to the business of a druggist must be held to signify ‘the highest practicable degree of prudence, thoughtfulness and vigilance, and the most exact and reliable safeguards consistent with the reasonable conduct of the business in order that human life may not constantly be exposed to the danger flowing from the substitution of deadly poisons for harmless medicines.’ (*Tremblay v. Kimball*, 107 Maine, 53.)”

This is the rule that seems to be laid down in *Peters v. Johnson*, 58 W. Va., 644; *Sutton's Admr. v. Wood*, 120 Ky., 23; *Faulkner v. Birch*, 120 Ill. App., 281; *Knoefel v. Atkins*, 40 Ind. App., 428.

In *Tremblay v. Kimball*, *supra*, the court said at page 57:

“But while as has been seen, the legal measure of the duty of druggists towards their patrons, as in all other relations of life, is properly expressed by the phrase ‘ordinary care,’ yet it must not be forgotten that it is ‘ordinary care’ with reference to that special and peculiar business.”

Then the court discusses the nature of the apothecary's business, his relation to the public, and what ordinary care means under those circumstances.

Having read all of these decisions thoroughly and having read the charge in the case at bar carefully, I can not see that there is any substantial distinction between the rule laid down in the case at bar and that laid down in these authorities.

3. Counsel for plaintiff complains that the court erred when, on page nine of the general charge to the jury, the court used the following language:

“The plaintiff must show by a preponderance of the evidence that the said mixture at the time of its delivery to the decedent's

son contained cyanide of potassium and that the said mixture was the mixture that was taken by the decedent and that the said mixture so taken by him was the direct cause of his death. If she fails to satisfy you of these facts by a preponderance of the evidence, then she can not recover. If she does satisfy you of these facts by a preponderance of the evidence, then she is entitled to recover the damages allowed by law in cases of this kind."

That this was technically an error under the rule laid down in *C., H. & D. Railway Co. v. Frye*, 80 Ohio St., 289, there can be no doubt: In that case the Supreme Court condemned the use of the word "satisfy" and reversed the decision because of that error as well as an error with reference to the charge on the question of providing a safe place to work, holding that the court erred in charging the jury that it was the duty of an employer to provide his employee with a safe place to work, whereas the duty on the employer was to exercise ordinary care to provide his employees a safe place to work; that while the court in one portion of his charge did charge the correct rule of law by saying the duty was one of ordinary care to provide a reasonably safe place to work, in another place he said it was the duty of the defendant to provide a reasonably safe place to work, and that therefore the jury was misled by these two contradictory charges, as well as by the charge that they must be satisfied of the truth of the facts establishing plaintiff's contributory negligence.

I have examined this case very carefully in view of the particularly vigorous language of the opinion. However, in looking at that portion of the Supreme Court's opinion which deals with the error with reference to the use of the word "satisfy," I find that they criticised the trial court's charge not only because of the use of the word "satisfy," but the use of the word "truth." In other words, they said the effect of the trial court's charge was that the jury must be satisfied of the truth of the facts set forth as constituting plaintiff's contributory

1915.]

Meyer, Administratrix, v. Flannery.

negligence and this was requiring a greater quantum of proof than was required under the law.

However, in the charge in the case at bar the court all through his charge used the language: "must prove by a preponderance of the evidence the essential facts necessary for plaintiff to make out her case," and then on page eleven in the charge, after the use of the word "satisfy" complained of above, the court instructed the jury as to what he meant by preponderance of the evidence by using the following language:

"By the term, burden of proof, I mean, of course, the preponderance of the evidence, the greater weight of the evidence. When a party has a burden of proof to sustain, it does not necessarily mean that he must have the greater number of witnesses; it simply means that the evidence on his side must be more convincing; it must outweigh or preponderate over that on the other side, in which event that side is said to have the preponderance of the evidence. You are to place the evidence, as it were, in a pair of scales, and if the evidence of the plaintiff upon the issues as I have laid them down to you, weighs more heavily in her favor, then the preponderance is in her favor. If it is evenly balanced and you are unable to determine upon which side it weighs the more, then the plaintiff has failed to sustain the burden of proof; and if it weighs more on the side of the defendant, the plaintiff has failed to sustain the burden of proof."

Now it would seem to be fair to assume that the court having, in a half dozen places in his charge, simply said that the plaintiff must make her case by a preponderance of the evidence, and then at two other places in the charge used the word "satisfy," then followed that up immediately by a clear explanation of what preponderance of the evidence means, the jury must not have been misled by the use of the word "satisfy." I personally am of the opinion that twelve jurors drawn from the ordinary walks of life are not at all misled because of an etymological distinction that may exist between the word "satisfy," which some of the courts say is erroneous, and the word "believe" or

words of similar import, which none of the courts say is erroneous.

But as the Supreme Court in the Frye case used extremely vigorous language in condemning the use of the word "satisfy," I have made a fairly exhaustive examination of the authorities on the subject and it might not be amiss to simply make some review of them.

In *L. & N. v. Timber Co.*, 126 Ala., 195, the court in criticising a charge using the word "satisfy" said that if the court had used the expression "reasonably satisfy" that would be all right.

In *Rolfe v. Rich*, 149 Ill., 436, the court said that the use of the word "satisfy" in a charge is erroneous, but such error will not call for a reversal when it clearly appears that it could not have worked the defendant any injury.

In *Mitchell v. Hindman*, 47 Ill. App., 431, the court criticised a special instruction as given because of the use of the words "to the satisfaction of the jury by a clear preponderance of the evidence," laying much stress on the erroneous use of the word "clear."

In *McMillan v. Baxley*, 112 N. C., 578, the court simply held that it was not erroneous for the trial court to substitute the words "preponderance of the evidence" for "to the satisfaction of the jury."

In the following Texas cases the use of the words "to the satisfaction of the jury" or words of similar import were declared erroneous, but it did not appear that the trial courts in any way qualified the use of the words and the cases were reversed upon other grounds as well: *Finks v. Cox et al*, 30 S. W., 512; *McGill v. Hall et al*, 26 S. W., 132; *Grigg v. Jones*, 26 S. W., 885; *Feist v. Boothe*, 27 S. W., 33.

In *Kenyon v. City of Mondovi*, 98 Wis., 50, the trial court instructed the jury as follows:

"And if you are satisfied from the evidence that the injury that the plaintiff has suffered is permanent in its nature, and will continue to affect his health and physical condition in the

1915.]

Meyer, Administratrix, v. Flannery.

future, and cause him pain and suffering in the future," etc.

Objection was made to this charge, but the Supreme Court, at page 54, in disposing of it said:

"If a jury are satisfied of the existence of a fact, it would seem that they must be reasonably certain of it. We see no defect in the instruction, and we think there was sufficient evidence to base it on."

In *Torrey v. Burney*, 113 Ala., 496, the court holds that the use of the word "satisfy" in a charge to the jury is erroneous, but also seems to hold that if it were the only error in the case they would determine from all the evidence whether or not it was error without injury.

In *Cox v. Royal Tribe*, 42 Oregon, 365, the court says in an action upon a policy of insurance, seventh paragraph of the syllabus:

"A further instruction that the beneficiary was therefore entitled to recover 'unless the evidence introduced has overcome this presumption, and satisfied you that death was voluntary,' was not objectionable because of the word 'satisfied,' where the court had previously charged that defendant was required to establish suicide to the satisfaction of the jury by a preponderance of the testimony."

And at page 376 the court says that—

"To be 'satisfied' by a preponderance of the evidence and to be 'satisfied' in a general sense are entirely different conditions of the mind, and the term was, as clearly indicated by the court, employed in the former sense."

And in *Stewart v. Outhwaite*, 141 Missouri, 562, the court holds as follows:

"The use of the word *satisfied* in the sense of *believe* is not error if it appears not to be misleading."

And at page 571 the court uses this language:

"The objection to the word 'satisfied' we do not consider weighty. As it is used in the fifth instruction, the word does not convey the impression that the jury must be convinced beyond a reasonable doubt. The latter part of the instruction shows that belief of the jury is all that is required. The word 'satisfied' is not wholly satisfactory in such an instruction, and is not to be commended. If it appeared to be misleading, it might be fatal to an otherwise fair result. But its meaning is no wider, in its present place, in demanding the mental concurrence of the jury, than is conveyed by the accompanying words 'preponderance of the evidence.' That phrase has a popular and colloquial significance which the average jurymen may fairly be supposed to grasp. Its use in an instruction is not of itself error. *State v. Smith* (1873), 53 Mo., 267; *Berry v. Wilson* (1876), 64 Mo., 164. Nor does the word 'satisfied' constitute a fatal blemish in the instruction as it stands."

And in *Rosenbaum v. Levitt*, 109 Iowa, 292, the court said that the use of the word "satisfied" without qualification or explanation is misleading. Evidently the court had in mind that if the word "satisfy" was qualified by some charge explaining to what kind of satisfaction the jury must come with reference to an issue in dispute, the charge would not be considered erroneous.

In *Callan v. Hanson*, 86 Iowa, 420, the court held:

"An instruction to a jury requiring the plaintiff in a cause to make out a *prima facie* case to the 'satisfaction' of the jury, held, not objectionable, as requiring of the plaintiff a measure of proof greater than a preponderance of the evidence, where, in another paragraph of the court's charge, the jury were instructed to find for the plaintiff, if 'from a preponderance of all the evidence' they were 'satisfied' that the claim of the plaintiff was established.

"The use of the word 'satisfied' in the above connection has the force only of the words 'find' or 'believe' and therefore was not erroneous."

And the same rule was laid down in *Carstens v. Earles*, 26 Wash., 677.

1915.]

Meyer, Administratrix, v. Flannery.

I have cited these cases at some length because I was struck by the peculiarly harsh language used by our Supreme Court in *Railway Company v. Frye*, in the latter part of its opinion, with reference to the use of the word "satisfy," and I have examined all these authorities with a view to determining whether or not that language was justified; and I have not found a single instance wherein a court of intermediate or last resort in any state has reversed the decision of a lower court for the single error that might be found in the use of the word "satisfy," but I have found them all tending to disregard the use of the word if the case was otherwise fairly tried, and in a great many instances I find them construing the word with reference to other language in the charge, and holding that if the word can be determined from the whole context to mean nothing more than reaching that state of mind where the jury merely determines on which side the preponderance of the evidence lies from the probabilities to be deduced from the testimony of the respective witnesses, then the use of the word can not be said to be misleading and prejudicial.

Our Supreme Court is coming to that manner of reviewing charges wherein alleged technical errors are urged.

On April 1, 1914, they reversed the judgment of the Court of Appeals of Hamilton County in the case of *Railway Company v. Pritz, Admr.*, because that court had affirmed the court of common pleas instead of reversing it for error in the court's charge to the jury as follows:

"You have a right to reject any evidence that you choose and consider only that which appeals to your sense of justice and fairness." *Ohio Law Reporter*, Vol. 12, page 7.

On January 12, 1915, the Supreme Court affirmed the judgment of the Circuit Court of Hamilton County, in the case of *Fox v. Jewell*, using the following language in its journal entry:

"This cause came on to be heard upon the transcript of the record of the Circuit Court of Hamilton County and was argued

by counsel. On consideration whereof the court finds that the trial court erred in giving the following in its charge to the jury: 'You have the right to disregard any evidence that you choose and consider only that which appeals to your sense of justice and fairness.' But the court further finds upon consideration of the entire charge and of the whole record that such error was not prejudicial to the rights of the plaintiff in error and that substantial justice was done in the judgments of the courts below. It is therefore ordered and adjudged by this court that the judgment of the circuit court be and the same is hereby affirmed." *Ohio Law Reporter*, Vol. 12, page 389.

We have here an example of our Supreme Court passing upon charges in two different cases, given by the same judge and practically in the same language, holding in the first case that the giving of the charge was prejudicial error and in the second that it was not prejudicial error.

I think that the use of the word "satisfy" in this charge should be examined in the light of the whole charge and in connection with the entire record, and I believe that when that is done it will be clearly seen that there was no prejudicial error in the use of the word. I think that the principle seemingly laid down in the *Frye* case should be sent back to the Supreme Court for further consideration and I am convinced from an examination of the authorities that the Supreme Court will be willing to modify the language that it used with reference to the use of the word "satisfy" by the trial judge, although I am frank to say that with the meager statement of what the charge of the trial court in the *Frye* case contained it may be possible that the use of the word "satisfy" of the "truth" of certain propositions without qualification can not be justified by any of the authorities. However, that same criticism can not be made of the charge in the case at bar.

Applying the rule that was applied in the case of *Baird v. Burton Telephone Company*, 10 C.C.(N.S.), 163, wherein the Circuit Court of Geauga County held that while the trial court had committed error in putting the burden of proof upon the

1915.]

Wilde v. Ohio Knife Co.

wrong party, that upon the entire record it did not appear that this was prejudicial, and that the rule of substantial justice as required by the statute should be applied, I think the motion should be overruled in this case and an entry will be made accordingly.

**AS TO LIABILITY FOR INJURIES TO INTRUDING
CHILDREN.**

Superior Court of Cincinnati.

GEORGE WILDE, JR., v. THE OHIO KNIFE CO. ET AL.*

Decided, June 8, 1914.

Negligence—Temporary Structure Erected Over Sidewalk—Child Climbs Upon it and is Injured—Property Owner Not Liable.

An abutting owner who, lawfully or otherwise, erects a temporary structure over the sidewalk is not liable in damages for injury to a child three and one-half years of age, who was attracted to the structure and climbed upon it and, stepping upon a loose board, fell through to the sidewalk and received the injuries complained of.

A. D. & R. S. Alcorn, for plaintiff.

Robertson & Buchwalter, Sanford Headley and Harry Neal Smith, contra.

PUGH, J.

Ruling on demurrer to second amended petition.

The plaintiff in this case, George Wilde, Jr., is a minor, three and one-half years of age, and brings the action by his next friend, George Wilde, against the Ohio Knife Company, a cor-

*Affirmed by the Court of Appeals without opinion; motion for an order directing the Court of Appeals to certify its record overruled by the Supreme Court, February 1, 1916.

poration, and one August Hitzman. The case now comes up on general demurrer to the second amended petition.

The allegations of the pleading are that the Ohio Knife Company, on August 16th, 1913, was the owner of a factory building then in process of construction, near the intersection of Dreman and Dawson avenues in this city, and that both the defendants "negligently, carelessly and contrary to law obstructed said public street and sidewalk" by constructing over the sidewalk in front of the factory "a wooden overhead structure" and by placing in the street itself "a concrete mixer." It is then averred that the "said structure was unlawfully erected and maintained and was a dangerous structure," and that the defendants knew it was dangerous and took no proper precautions to guard it.

It is stated that the structure was unlawful in that it was erected and maintained without a permit so to do having been obtained from the city authorities, but it is not stated wherein the structure was dangerous or why it required a guard. The allegation that the structure interfered with "the proper and lawful use of said public sidewalk" is irrelevant, as this circumstance, if true, is in nowise connected with the accident—as will presently appear. It may also be noted that the pleading does not show what connection the defendant, August Hitzman, had with the matter, although by the use of the word "defendants," in the plural, he is included with the other defendant, the Ohio Knife Company, in all the allegations of negligence and wrongdoing. It may be inferred, however, that Hitzman was a contractor doing the work of building for the Ohio Knife Company and he will so be considered in this opinion.

The next allegation is that the plaintiff, a child of three and one-half years of age, on August 16th, 1913, was lawfully in said street and on said sidewalk and was attracted to said structure and climbed upon said structure within the limits of said public sidewalk, and, stepping on a loose board, fell to the sidewalk and was injured. It in no way appears that the concrete mixer, alleged to have been in the street, had anything to do with the accident, and it may therefore be disregarded.

1915.]

Wilde v. Ohio Knife Co.

There is a further allegation that the defendants knew that children played on the sidewalk "and knew that said unlawful structure attracted children and that they would go upon it."

Assuming that the structure was unlawful in that it was erected and maintained in violation of a city ordinance, this unlawfulness could have no connection with the accident. The real question is this, "Is the owner of property which abuts upon a public street and sidewalk and who erects a temporary structure over such sidewalk in such a way that it is a temptation to children in the neighborhood to climb and play upon, liable in damages to a child of three and one-half years old who climbs upon such structure and is injured through some defect therein?"

In view of the principle laid down by the Supreme Court in *Railroad Co. v. Harvey*, 77 Ohio St., 235, the answer must be in the negative.

It will be observed that in this case the child in climbing upon the structure was a trespasser. So long as it remained on the sidewalk, or even in the street, it was at a place where it had the right to be, but as soon as it got on the structure it was encroaching on the private property of the defendants. The circumstance, which we have assumed, that the defendants had no right to place the structure over the sidewalk, in nowise alters the situation. It was an obstruction to traffic and foot passengers and was unlawful for that reason, perhaps, but that did not give the plaintiff any right to use it for a playground—certainly, not to the extent of thereby imposing a duty upon the owner to exercise ordinary care and prudence to keep it in repair and safe for children to play upon. A pedestrian who suffered personal injury from defects in such structure while attempting to pass along the sidewalk, might perhaps be heard to complain of the unlawfulness involved in maintaining the structure, but, in the case disclosed by this second amended petition, it is obvious that there was no relation whatever between the unlawfulness alleged and the injuries suffered. The proximate cause of the injuries was the loose board—a defect in the structure itself, which would have been just as much the proximate cause if the structure had been authorized by law.

The plaintiff received no invitation to get upon or play with the structure nor was he even a licensee. If there were circumstances showing that by continued use on the one hand and long acquiescence on the other, the children of the neighborhood had become licensees in such respect, under the rule laid down in *Harri-man v. Railroad Co.*, 45 Ohio St., 11, there might have been something to say for the plaintiff's claim. But even in that event, it would not have been possible for the court to say to the jury that the defendants owed any duty to the children in the vicinity to keep the structure in such condition that it would be reasonably safe for them to climb upon or play with.

The case referred to, *Railroad Co. v. Harvey*, 77 Ohio St., 255, in the opinion of the court, is conclusive of the question raised by this demurrer.

The demurrer will, therefore, be sustained, and the plaintiff may amend within ten days, otherwise the case will be dismissed.

1915.]

Pavey v. Pavey et al.

AS TO THE TAXABILITY OF FUNDS HELD BY THE SHERIFF.

Common Pleas Court of Highland County.

HENRY A. PAVEY v. ELMER F. PAVEY.

Decided, April 8, 1914.

Taxation—Funds Held by Sheriff Awaiting Determination of Legal Rights—Not Subject to Taxation.

Money in the hands of a sheriff derived from sale in partition, and which he is ordered by the court to invest and hold to await the determination by the court of the rights of rival claimants thereto, should not be returned for taxation by the sheriff as "accounting officer" or otherwise.

NEWBY, J.

Certain real estate owned in common by the parties was sold in this case under the order of the court in partition.

Forty-six hundred dollars of the fund derived from the interest of Henry A. Pavey were withheld from distribution to await the determination of a claim asserted thereto by Elmer F. Pavey, a co-tenant. Some four or five years ago the court ordered the sheriff to invest the fund at interest until the further order of the court. The district assessor has listed this fund with its accumulations for taxation in the name of the present sheriff as "accounting officer" in the above styled case. The Supreme Court having recently determined the controversy between Henry A. and Elmer F. Pavey favorably to the latter, the case is now before this court for a final order of distribution, and the sole question is whether it was the duty of the sheriff to return for taxation the fund held by him, and thus make it necessary for him to retain an amount sufficient to meet the taxes to become due on the fund.

In the case of *McNeill, Assignee, v. Hagerty, Auditor*, 51 O. S., 255, the court held that personal property in whatever form held by an assignee of an insolvent debtor, whose estate is being settled in the probate court, is not subject to taxation in the hands of the assignee, and that it was not the duty of such assignee to make return of the assets of said estate for taxation,

and the reasoning of the court in that case, it seems to me, applies just as fully and conclusively to the question in this.

The law relating to the return of personal property for taxation and describing the class of persons whose duty it is to make the returns is worded the same now as it was in 1892, the year when the return was demanded of the assignee that was before the court in the case of *McNeill, Assignee, v. Hagerty, Auditor, supra*. And in that case the court attaches significance to the fact that in the category of those required to list property for taxation, assignees were not included. Sheriffs were not then and are not now named as tax-payers, and hence the omission of sheriffs is as potent a factor in the construction of the statute to exclude them from the ranks of those who must make tax returns as is the omission of assignees to exclude them.

In fact, Judge Spear in the 51st O. S. places assignees and sheriffs on the same footing. On page 269 of the report he says:

“If the clause of Section 2734, relating to the listing of trust property by trustees, requires a listing of property by the assignee of an insolvent whose estate is being settled in the probate court, no reason can be given why the same duty would not devolve upon receivers of partnerships, clerks of courts, sheriffs or master commissioners, as to funds which may chance to be in their hands on the day preceding the second Monday of April, subject to payment upon order of the court. To state such a proposition is to refute it. And this because it is unreasonable to assume that, in the absence of express authority, the duty to enlist embraces property which the law has taken into its own hands simply to collect and distribute, and of which it has designated a temporary trustee for the better accomplishment of its work.”

Another consideration that weighed with the court in the *McNeill-Hagerty* case was that the creditors of the assignor were the beneficial owners of the property in the hands of the assignee, and were subject to be taxed on their credits represented by their demands against the assignor, and hence to subject the property in the hands of the assignee to taxation from which property their demands were to be satisfied, the creditors would in effect be required to submit to double taxation. The same reasoning applies here. The fund in question was subject to be

1915.]

Pavey v. Pavey et al.

returned at some valuation and in some form, either as cash or as a credit, by the successful claimant. And if in addition to paying his own tax bill, he must stand a reduction in the amount in the sheriff's hands, of a sum necessary to discharge the claim against the sheriff, double taxation would be forced upon the claimant. Such a course would contravene our Constitution, which exacts equality in matters of taxation.

But it is suggested by the taxing authorities that the sheriff, under the circumstances of this case, is an "accounting officer" and as such it is his duty to list this fund for taxation under Section 5375, General Code. I can perceive no reason why a sheriff should be designated an "accounting officer" that would not apply with equal force to the case of an assignee, and the Supreme Court in the McNeill-Hagerty case evidently did not consider an assignee an "accounting officer" under the tax laws of the state or they would have held it his duty to make return in that capacity. But however that may be, it is only a certain class of accounting officers that are required to list property, and a county sheriff is not a member of that class. Section 5370, General Code, provides who shall list personal property. It provides for listing "the property of * * * a company, firm or corporation by the president or principal accounting officer, partner or agent thereof." This section contains the only provision casting the duty on an accounting officer to list property and he is only required to list the property of the company, firm or corporation in which he holds the position of principal accounting officer. So that Section 5375, General Code, which was formerly Section 2736, Revised Statutes, in its requirement that a person required to list property must make out on a blank furnished for the purpose a statement of the property therein enumerated "which he is required to list for taxation, either as owner or * * * accounting officer" has reference to "principal accounting officers" as described in Section 5370. And plainly a sheriff, if in any sense an "accounting officer," is not in the class of such officers reached by Section 5370, which confines the class to those who hold that relation to a company, firm or corporation.

In my judgment the sheriff is not required to list the fund held by him under the order of the court in this case and that he

Hogan v. Surety Co.

[Vol. 18 (N.S.)]

can not lawfully apply any of the funds in his hands to the discharge of a claim for taxes thereon or pay out the money to any person for any purpose except by and under the order of the court.

An order may be put on directing the distribution of the balance of the fund in the sheriff's hands without taking any account of the tax claim.

**CLAIMS AGAINST THE OHIO DEPOSIT OF A FOREIGN
SURETY COMPANY.**

Common Pleas Court of Franklin County.

**TIMOTHY S. HOGAN, ATTORNEY-GENERAL, v. THE EMPIRE STATE
SURETY COMPANY.**

Decided, December 15, 1915.

*Foreign Surety Becomes Insolvent—Conflicting Claims to its \$50,000
Ohio Deposit—Creditors of a Contractor Bonded by the Company—
Held to have a Lien Superior to that of the Superintendent of In-
surance of the Company's Home State.*

Under a bond by a foreign surety company, guaranteeing performance of a contract and payment of all claims for labor and material furnished the contractor, the deposit required as a condition precedent to doing business in Ohio inures, in case of insolvency of the surety company, is for the benefit of all who have claims against the contractor, and the lien of such claimants is superior to that of the superintendent of insurance in the surety company's home state, who asserts title to the deposit for the equal benefit of all policy holders of the company.

Timothy S. Hogan, Attorney-General, for plaintiff.

Booth, Keating, Peters & Pomerene, contra.

DILLON, J.

This action is brought by the Attorney-General under a special statute to determine what shall be done with a deposit of \$50,000 made by the Empire State Surety Company, a New York corporation, with the superintendent of insurance of Ohio, to secure the contracts of the defendant in Ohio.

This deposit was made in May, 1905, in the form of a Cleveland, Ohio, bond. Subsequently the said surety company failed

1915.]

Hogan v. Surety Co.

and ceased to do business and was placed in the hands of the superintendent of insurance of the state of New York for liquidation.

The prayer is that all persons be made parties to make any claim to any part of this fund; that the deposit be subjected to the payment of any liabilities which this company may have in this state, and that the deposit itself be reduced to cash, and that an order be made to distribute it among those persons entitled thereto.

To this petition the superintendent of insurance of New York answers, claiming that he and he only is entitled to this money and that the same should be ordered turned over to him for the equal benefit and protection of the policy holders of this company in proportion to their respective claims.

When this company was actively engaged in the business of insurance in Ohio, one Wells, in January of 1910, entered into a written contract with the United States of America for the reconstruction, remodeling and repairing of the United States Post Office at Lima, Ohio, and on February 1st, 1910, in compliance with the statutes of the United States of America, gave bond in the sum of \$28,000, with the Empire State Surety Company as surety, conditioned that said contractor "shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided in such contract." A number of those persons furnishing material, etc., have filed intervening cross-petitions setting forth the amount in which Wells, the contractor, is indebted to them for the materials, and that final payment has been made by the United States to Wells, leaving these various debts unpaid. To all these cross-petitions the superintendent of insurance of New York state has filed answers, all involving the same legal question, and it is upon demurrer to these answers that the case is submitted here.

The mere fact that a chief contractor gives to the owner a bond which is conditioned, among other things, that he pay all his debts or those who furnish materials and labor, does not inure to the benefit of those sub-contractors and laborers. This has been decided many times in this state, and recently in the case of *Roofing Co. v. Gaspard*, 89 O. S., 185.

Reliance in this case, however, is made upon the special provisions of the statutes of Ohio, and also of the federal statute, which will be considered later.

In the briefs for the defendant, superintendent of insurance of New York, it is contended that the pleadings show that this company was only authorized, and therefore could only legally act in this state in indemnifying for death, or personal injury, and had no power to sign a bond of this character, but this superintendent admits that the company was authorized to do business as alleged in the petition, and the allegations here with respect to its powers are not exclusive, and therefore this part of the defendant's contention can not be sustained.

Moreover, the answer admits that the said company was admitted to do business in this state under Section 9510, General Code. It is claimed that these cross-petitioners who furnished material were not policy holders; that the only policy holder was the United States Government. A strict construction of the statute might sustain this claim, but I do not deem it vital here. Under Section 9510, General Code, a company could be organized and admitted for a great variety of purposes, among others—

“to guarantee the performance of contracts (other than insurance policies) and execute and guarantee bonds and undertakings required or permitted in all actions or proceedings, or by law allowed, make insurance to indemnify employers against loss or damage for personal injury or death resulting from accidents to employees or persons other than employees, and to indemnify persons and corporations other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations. But a company of another state, territory, district or country admitted to transact the business of indemnifying employers and others in addition to any other deposit required by other laws of this state shall deposit with the superintendent of insurance for the benefit and security of all its policy holders fifty thousand dollars,” etc.

My interpretation of this last paragraph is that the deposit was required not only for indemnifying employers against loss, but for indemnifying others, and therefore the deposit was for “any others” who had any claim against the bond given by such company.

The citizenship of the parties to the action is not in any way limited by this statute, but it is designed to protect those per-

1915.]

Hogan v. Surety Co.

sons who do business in this state and who accept the bond of a foreign company. I have therefore concluded that the fact that some of these cross-petitioners were non-residents of Ohio, and the fact that the building in question was not a part, strictly speaking, of the state of Ohio, that is to say, not strictly under its jurisdiction, does not make any difference in the application of our statutes. The purpose of the statute is too plain to require much elucidation.

By Section 641, General Code, it is expressly and plainly provided that if any corporation, required by law to make a deposit with the superintendent of insurance to secure the contracts of said company or for any other purpose, fails to pay any of its liabilities upon such contracts or other obligations according to the terms thereof, after the liability thereon has been determined, or if such company ceases to do business and leaves unpaid any such liability, the Attorney-General shall commence a civil action in the Court of Common Pleas of Franklin County to determine the rights of all the parties, and subject this deposit to the payment or satisfaction of all liabilities, and distribute the fund among the persons entitled thereto, and a subsequent section, 656, provides how these liabilities or the fact as to whether there be any liabilities, or whether they have been paid, is to be determined.

Whether or not the intervening cross-petitioners are policy holders within the meaning of Section 9510 may be questioned so far as that statute is concerned, as is indicated, although the court does not feel that it need go into that question.

The United States statute, in the court's opinion, has settled that question. The act of Congress, approved August 13th, 1894, and subsequently amended, provides specifically that thereafter any person entering into a contract with the United States for the construction, repair or remodeling of any public building in the United States must before commencing such work execute the usual penal bond with good and sufficient sureties, *with the additional obligation* that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials; and it is further provided that any person who has furnished any such labor or materials, payment for which has not been made, shall have the right to intervene

and be made a party to any action instituted by the United States on such bond, and to have their rights and claims paid thereon, subject, however, to the priority of the claim of the United States.

It is further provided by said act that if the full amount of the liability of the surety on the bond is insufficient to pay the full amount, then after paying the full amount due the United States the remainder shall be distributed *pro rata* among said interveners.

It is further provided that if no suit is brought by the United States within six months any persons supplying the contractor with labor and materials may prosecute and obtain the same relief.

The entire statute need not be quoted here, but it can be tersely said that the statute gives the plain right to contractors against this company, and it only remains to be considered as to whether or not with that right the contractors have a special lien upon this fund of \$50,000.

Taking this United States statute last quoted, and the statutes of Ohio together, I have come to the conclusion that it does give such contractor a lien on this fund; that that was the broad purpose as expressed in the broad terms of our statutes, for which this money was held.

I need not pass upon the question as to the jurisdiction of the receiver appointed by the court in New York. We are all familiar with the fact that the appointment of a receiver in one state does not operate *ipso facto* without its jurisdiction. Ancillary receivers are sometimes appointed to assist in other jurisdictions, but the appointment of this receiver in New York State, or the action of the superintendent of insurance in New York for liquidation, is without any extra-territorial effect with respect to the rights of claimants to the deposits of insurance companies in other states. Otherwise the laws of the various states in that regard would be completely nullified.

Some of these cross-petitioners have filed their claims with the superintendent of insurance of New York, and it was claimed that they are now estopped to payment here. I can not adopt this view. I think these claimants have a perfect right to file their claims with every official who has property and the power

1915.]

Protective Association v. Roebling.

of distribution of this surety company, and that if the amount deposited in this state is insufficient for payment in full they have a right to file their claims for the balance due them with the superintendent of insurance of New York.

Counsel in preparing the decree will provide for the appropriate action to convert the bond into cash and to distribute the proceeds, and if counsel then do not agree upon the appeal bond the court will fix it.

POWER OF A COURT TO COMMIT FOR CONTEMPT.

Superior Court of Cincinnati.

THE JUVENILE PROTECTIVE ASSOCIATION ET AL V.

MILLARD F. ROEBLING.

Decided, February 12, 1916.

Contempt—Witness Committed on Suspicion that His Statements Were Untruthful—Right of Such Witness to Purge Himself—Must be Acquitted of the Imputed Contempt, When.

1. Where a witness has been sent to jail for contempt for an act or acts tending to obstruct justice in contempt proceedings, the witness can purge himself of contempt by thereafter answering under oath that what he had done or said was in good faith and true, without any intent to commit contempt or offering any disrespect for the court.
2. The plenary power bestowed in this state by the General Code of Ohio, Section 12136, to commit a witness to jail for contempt for misbehavior in the presence of the court tending to obstruct justice, does not extend to or include authority to send a witness to jail for contempt where he answers all questions put, but impresses the court with a belief of the untruth of his statements. A witness can not be sent to jail for contempt on mere suspicion of untruthful statements.

Hosea & Knight, for the Juvenile Protective Association.

Albert H. Morrill and Robt. M. Ochiltree, for Millard F. Roebling.

Chas. W. Baker, for Henry S. Rosenthal.

GUSWEILER, J.

Opinion on motion in re Henry S. Rosenthal.

On November 6, 1914, a former judge sitting as a member of this court, in the record and proceedings of said court, in this case then and there had, among other things, made the following order and pronounced the following sentence, to-wit:

"State of Ohio v. Henry S. Rosenthal.

"The said Henry S. Rosenthal having refused and failed to testify to the truth in a certain case No. 56167 then pending in said court after being summoned and sworn as a witness in said case, and having thus obstructed justice and being guilty of contempt in the presence of the court, it is therefore the sentence of the court that the said Henry S. Rosenthal be imprisoned in the county jail in the city of Cincinnati in Hamilton county, and kept until he purges himself of such contempt by testifying to the truth in said case. The defendant to stand committed until he has thus purged himself of said contempt."

Henry S. Rosenthal, the witness and person referred to in this foregoing order of contempt, comes into court now, by his counsel and in person, on the 17th day of January, 1916, by motion on leave of court first had and obtained, and moves this court for leave to offer testimony in this case, purging the said Henry S. Rosenthal of contempt or of intending to commit contempt of this court and to show that no contempt was committed or intended. That on final hearing the court may purge the said Henry S. Rosenthal of contempt and make an order of satisfaction and purging in regard to such order as to said order of Friday, November 6, 1914.

Messrs. Hosea & Knight, attorneys representing the Juvenile Protective Association, the plaintiff herein, object to everything; they object to this entire proceeding as irregular and illegal and say that this court has no right or authority to consider this motion for any purpose.

The question of contempt of a witness is well settled by uniform authority to be a question between the court and the witness, and no authority or person has a lawful right to object or interfere. This conclusion is supported by unbroken and universal decisions throughout the United States and England. After much careful consideration and investigation, as to the law applying, the court is of the opinion that it has full and absolute control and authority over its own previous contempt order heretofore made herein; that it has lawful and inherent

1915.]

Protective Association v. Roebling.

power and right to modify, lessen or absolve altogether the contemptuous witness of further responsibility owing to this court, under said previous contempt order.

Without this inherent right and power, and without the decisions of law on this point, this witness under the contempt order heretofore made herein, *would be constrained to remain in jail forever*, if he were to be denied the right to come into this court later and endeavor to purge himself, if he could, of this charge of contempt. Judge Hosea, of counsel for plaintiffs, contends that the witness's sole remedy is a proceeding in error, with which the court does not agree. For the purpose of argument, let us assume a case where the contemptuous witness was really in fact unable to comply with the court's order. What would happen? The witness necessarily would remain in jail forever. Can this theory be logically or seriously contended for?

There appears nothing in this contempt order previously made herein, indicating a possibility of the witness being able to comply with the court's order, as is required by law. The court says, in *Adams v. Haskick & Woods*, 6 Cal., 319:

"A commitment for contempt for refusing to obey an order of court commanding the imprisonment of the party in contempt until he shall comply with the order, *should be set forth that it is in the power of the party to comply.*"

Cases holding that the court making the contempt order is the exclusive judge of its own contempt proceedings and has sole and full power and control thereover and can modify, relieve and suspend a fine or imprisonment are: *In re Nevitt*, 117 Fed. Rep., 448; *In re Wilson Walker*, 82 N. C., 95; *Hendryx v. Fitzpatrick*, 19 Fed. Rep., 810; *Adams v. Haskick & Woods*, 6 Cal., 318; *City of New Orleans v. N. Y. Steamship Co.*, 20 Wall., 387-392; *In re Debs*, 158 U. S., 564; *Jos. Ammon v. T. H. Johnson*, *Guardian*, 2 O. C. D., 149; *Olney v. Watts*, 43 O. S., 499; *King v. King*, 38 O. S., 370; *Fisher v. Fisher*, 32 Ia., 20; *McGee v. McGee*, 10 Ga., 486; *Wheeler v. Wheeler*, 18 Ills., 40; *Rogers v. Vines*, 6 Ired., 293; *Lockridge v. Lockridge*, 2 B. Mon., 258; *Law v. Law*, 15 O. C. C., 409; *In re Madden*, 83 O. S., 506; *In re Madden*, 11 C.C.(N.S.), 238.

Having in mind the foregoing authorities, and even without said decisions, this order of contempt provides that the witness

go to jail until he complies with the court's former order, it is palpably apparent that this order could never be complied with if Messrs. Hosea & Knight are correct in their contention, and the contemptuous witness were denied the right to come into this court later and offer to purge himself. Therefore, on this point, this court will hold and finds that under all the present circumstances, this witness, Henry S. Rosenthal, has a legal right at this time to have this court hear him on the question of permitting him to offer testimony and evidence in order to purge himself of contempt; that this court, and no other authority, has power or right to determine or pass upon this particular question.

Although the record in this case discloses strange and peculiar entries, inconsistent with the evidence and testimony offered at this hearing, in that the cause was continued from Wednesday, November 4, 1914, to the 12th day of November, 1914, and notwithstanding the case was again heard further on the 5th day of November 1914, at which time this particular witness, who was not a party to the action, was subpoenaed *duces tecum*; and although the record also indicates that counsel for plaintiffs and defendant were present, but the testimony of said counsel on the witness stand in this hearing, proving said entry and record untrue, and counsel for the Juvenile Protective Association and the court were the only persons present with this witness, as to whether or not this, and other matters occurring at the time of the examination of this witness and former hearing were irregular and unlawful, this court does not think it necessary or essential for the purposes of this motion, to pass upon at this time.

On the question as to whether there should have been charges filed against this witness and a hearing had in contempt under Section 12137, General Code of Ohio, in accordance with law, or whether the former judge of this court had authority, under Section 12136, General Code of Ohio, to make the order of contempt made herein, under all the circumstances of this case, or whether said former judge of this court acted properly within the exercise of his plenary power thereunder, in sending a witness to jail for contempt when the court *did not know*, but *thought* him guilty of perjury, this court does not deem it neces-

1915.]

Protective Association v. Roebling.

sary or essential for the purposes of this motion to pass upon at this time.

From an inspection of the record of the former examination of this witness, it appears in the case at bar that *the witness did not refuse to answer any of the court's questions*. On the contrary, it appears that *he answered every question propounded to him by the court*. The crisis came, and he was ordered taken to jail for contempt, when the court said to the witness: "Are you prepared to give us any further information on that subject?" and the witness answered, "No, sir." Then the court in effect said that because the court *thought* the witness was not telling the truth; he should go to jail for contempt.

It is the law, that a witness can not be held for contempt where a witness in answer to a question says: "I don't recollect," "I don't remember," or "that's all I know," as in this case.

Our circuit court here has so held, and Judge Frank M. Gorman, in quoting our circuit court in the case of *Morrison & Snodgrass Co. v. Hazen et al*, 10 N.P.(N.S.), 353 and 361, said:

"It is true the circuit court has held that Hazen's answer 'I don't recollect' or 'I don't remember' to questions which it was obvious he could have answered, did not constitute contempt."

Nevertheless, for the purposes of this motion, this court does not deem it essential to pass upon the question of the former judge of this court having a lawful right or power under these circumstances, to commit this witness to jail for this act or answer, as contempt.

The final question, and the real substantial issue in the case at bar after all the testimony has been given and all the evidence has been heard is: *Has this witness, Henry S. Rosenthal, proven sufficiently, to this court now at this hearing, his honesty and good faith and the truth of his statements and answers? Has the dignity of this court been maintained? Has justice been unobstructed by this witness? Whether from all the testimony and evidence now submitted, has he acted in good faith in maintaining toward this court its full and proper dignity under all the circumstances of this case?*

To determine these questions, we must consider the various angles of the case and the different items or proof established by the evidence introduced at this hearing. It is evident that up to the present moment, more than a year and several months having elapsed since this suit was filed, and this witness previously examined, no one has been able to prove or discover who the person was who ordered the printing of the objectionable circular involved in this case, notwithstanding both plaintiffs and defendant have had public authorities working on the case in an effort to trace the same, all without effect. No evidence of any kind whatsoever has been presented at this hearing convincing the court that this witness, Rosenthal, was not telling the truth as far as he knew, and nowhere in this hearing is the testimony of Rosenthal proven untrue. Messrs. Hosea & Knight say that the evidence creates and discloses a *suspicion of untruth*. Has this court a lawful right and power, and should it send a witness to jail for contempt on *mere suspicion*? This court will not take the responsibility for sending a witness to jail for contempt on *mere suspicion of untruth*.

Contempt proceedings, the law holds, are *quasi* criminal in their nature and must be by law strictly construed and *always in favor of the witness*. So held in the following cases: *In re Habeas Corpus of John H. Quick*, 1 O. N. P. (N.S.), 57; *Bank v. Becker*, 62 O. S., 289; *White v. Gates*, 42 O. S., 112.

All presumptions that the witness in this case is telling the truth, the law declares, should be construed in favor of the witness. *Mere suspicion is not enough*. The court so said in *Ashley v. Bd. of Supv., etc.*, 83 Fed. Rep., 534, 540.

The law seems well settled that in cases wherein an act or acts tend to obstruct justice in contempt proceedings, the witness purges himself of contempt by answering under oath, that what he had done or said was in good faith and true, without any intent to commit contempt or offering any disrespect for the court. These are the words of the court in *Wells v. Commonwealth*, Gratton Rep., Vol. 21, 500. And so in the cases of *United States v. Dodge*, 2 Galleon, 312; *Hollingsworth v. Duane*, Wallace Rep., 78; *U. S. v. Duane, id.*, 102, the law being recited as follows:

1915.]

Protective Association v. Roebbling.

"If the party by his affidavit and answer on oath to interrogatories proposed by the district attorney, discharges himself of the contempt, no further proceedings can be had against him on the attachment. Collateral evidence can not be received for the purpose of impeaching the testimony of the accused. *His answers are conclusive*, and no proofs and affidavits can be introduced in opposition to them. *A prosecution for perjury is the only remedy if he answers falsely.*"

In line with the foregoing we also find the law in Murdock's case, 2 Bland's Ch., 486 and 487, holding as follows. The court says:

"If the party attacked makes a full and frank answer to all facts and positively denies or justifies all that is alleged against him, he must be at once discharged as having entirely acquitted himself of the contempt imputed to him."

In the case at bar, this witness now comes into this court and answers under oath *all questions* propounded to him and says that all his answers are true and that he has acted in good faith, without any intent to commit contempt or offering any disrespect to this court. The witness further testifies that he and his counsel and others have, at all times, ever since the former examination of the witness, made diligent effort toward tracing and locating the unknown person responsible for the circular mentioned. He brings into court all his books, files and data, and answers freely all questions. Some of Cincinnati's most prominent and reputable bankers, manufacturers and commercial citizens testify to the witness's reputation for truth and veracity and his good standing in the community. The court has listened patiently and carefully to all the evidence submitted, and has permitted all parties interested and concerned in this case the widest latitude in examination and cross-examination, in order that this court might come into possession of all the facts and circumstances. While the case truly is peculiar and the circumstances surrounding the case unusual, nevertheless, no evidence appears in this hearing, justifying this court in a belief, or even a reasonable impression, that the witness, Henry S. Rosenthal, has not been telling the truth. Surely, his statements, if untrue, could have been so proven, within the past fifteen months.

Evidence has been introduced at this hearing tending to create a suspicion that a certain political party's campaign committee, for sinister purposes, caused this objectionable circular to issue; that this suspicion arises by reason of the fact that certain of the membership of this political committee were also members of the plaintiff association, and both bodies worked in harmony for the election of the same certain political candidate. On this suspicion, without any proof sustaining the same, should this court find this political committee guilty of having been responsible for the issuance of this objectionable circular? Certainly not. And the same process of reasoning should apply in the consideration of the case at bar. *Mere suspicion can not be substituted or supplanted for facts or actual proof.*

Appreciating fully the deep sense of duty which this court owes to itself, by which the dignity of the court must be maintained, and that justice must not be obstructed, nevertheless this court is of the opinion from the evidence submitted, that this witness has not wilfully told an untruth, and the court will give him the benefit of any doubt that Messrs. Hosea & Knight contend arises by reason of the unusual circumstances surrounding the case.

The finding of this court, based upon the law and evidence submitted, is that at this hearing the witness, Henry S. Rosenthal has not wilfully told an untruth; that he has told all he knows concerning this case and is not guilty of contempt of this court; that he has not obstructed justice and has now satisfactorily purged himself of all contempt, if any contempt was heretofore committed. The said Henry S. Rosenthal is hereby released and discharged of all contempt of this court as a witness in this case.

A proper order of satisfaction and purging may be drawn, embodying a finding that the said Henry S. Rosenthal is now purged of all contempt of court in this case and released of all responsibility attaching thereto, at the costs of plaintiff.

1915.]

State v. Railway.

**CLASSIFICATION OF RAILROAD COMPANIES AND INTERURBAN
RAILROAD COMPANIES.**

Common Pleas Court of Franklin County.

STATE OF OHIO V. THE LORAIN, ASHLAND & SOUTHERN
RAILWAY CO.

Decided, February, 1916.

Railways—Determination of Amount of Excise Tax Due from—Companies May Have a Double Character and do Both a Railroad and an Interurban Railroad Business.

1. The distinction between a railroad company and an interurban railroad company is not found in its motive power, but rather in the frequency of the service it is rendering and of the stops made by its trains and the character of its business.
2. A single transportation operation may be divided into two parts, and the carrier may for the purpose of fixing its excise tax be regarded as a railroad company as to a part of its business and as an interurban railroad company as to the remainder.
3. The allegation of the answer of the defendant company as to its passenger or motor car service is such as to constitute it, as against demurrer, an interurban railroad company as to that part of its business.

*Edward C. Turner, Attorney-General, and C. D. Laylin, for plaintiff.**Morton, Irvine & Blanchard, Semple & Sherrick and R. J. Odell, contra.*

EVANS, J.

Decision on demurrer to the answer.

This action seeks to recover against defendant excise tax claimed by the state for the year next preceding July 1, 1914, upon the gross receipts of that part of defendants' railroad operated between Ashland and Custaloga, a distance of about twenty-one miles. The claim of the state is that said railroad is and was during said time a corporation organized under the laws of Ohio for the purpose of operating a railroad wholly within

this state from Lorain to Custaloga, and, as such, under the statute, the claim of the state is that defendant is liable for the payment of four per cent. excise tax upon its gross receipts.

There is no question in this case as to the liability of defendant to pay said excise tax as a commercial railroad upon that part of defendant's railroad operated between Ashland and Lorain. The question here is whether that branch of said railroad between Ashland and Custaloga is a commercial railroad and thereby subject to the four per cent. excise tax, or whether it is an interurban railroad and should pay but one and two-thirds per cent. excise tax upon its gross receipts for that part of the road.

Two questions are presented which are, more specifically stated:

1. Whether under the statute a single transportation operation may be divided into two parts, and the operating company regarded as a railroad company in part, and an interurban railroad company in part?

2. If such a division of the parts can be made, do the facts stated in the answer show that the passenger or motor car service of the defendant is such as to constitute it an interurban railroad company as to that alleged branch of its business?

The answer, among other things, admits that defendant is a corporation organized under the laws of Ohio for the purpose of operating a railroad, and is now engaged in the operation of a railroad wholly in this state, from Lorain to Custaloga. Except as to certain other admissions not material here to state, defendant denies all other allegations of the petition.

Further answering, defendant says that during the period from June 30, 1913, to July 1, 1914, it operated its line of railroad by both steam and electric power, all of its freight business being handled by steam locomotives, and all of its passenger, express, milk and baggage business being handled by means of the Edison-Beach electric storage battery motor cars. That during the period in question the line of railroad of defendant was in operation only from Ashland to Custaloga, a distance of 21.5 miles; the remaining portion of the railroad being then under

1915.]

State v. Railway.

construction; that during a portion of said time defendant's motor cars made three daily round trips, except Sundays, when they made two round trips; that during another portion of said time said motor cars made two round trips except Sundays; that during said time said motor cars made regular stops at all villages and stations between Ashland and Custaloga, and also stopped upon flag at every public highway and road crossing along the line between said points; that said motor car service, and the time, trip, stop and tariff schedules of the service, at all times fully met and satisfied all the demands and requirements of the company's patrons and the general public; that the change from steam to motor power was in the interest of and at all times has inured to the benefit of the company's patrons and the general public; that thereby the company was enabled to give and perform the service with greater speed and with more frequency of stops and service.

Defendant further avers that its gross earnings from its steam train service during said time was reported separately in detail in its annual report of gross earnings to the tax commission of Ohio, and that the same amounted to \$22,860.07; that the gross earnings from its motor car service during same time was reported separately in detail in its annual report of gross earnings to the said tax commission, and that the same amounted to \$9,748.93. That on July 12, 1915, defendant tendered to the state treasurer the sum of \$1,031.39 as payment in full of said excise tax, this tender being for four per cent. on the gross receipts of the steam train service, and one and two-tenths per cent. on the gross receipts of the motor car service, which said treasurer refused to accept.

Defendant offers to confess judgment against it for said sum of \$1,031.39, and prays to be dismissed with its costs.

Except the reported cases of the Cincinnati, Georgetown & Portsmouth Railroad and two other railroads named, against the state tax commission, reported in 10 Nisi Prius (N. S.), 617; and *Hocking Valley Ry. Co. v. Public Utilities Commission*, 92 O. S., — (Ohio Law Reporter of Dec. 20, 1915), there are no other decisions of any court of record in this state that have any

bearing upon the issues here presented. A determination of the issues, therefore, devolves largely upon a construction of the statutes (the Public Utilities Act), Sections 5485, *et seq.*, Code, and the amendments thereof in 102 Ohio Laws, 224, *et seq.*

Section 5416, Code, seeks to define an interurban railroad company, and a railroad company, and to distinguish between the two. That section provides that a company or corporation "when engaged in the business of operating a street, suburban or interurban railroad, wholly or partly within this state, whether cars used in such business are propelled by animals, steam, cable, electricity or other motive power, is a street, suburban or interurban railroad company."

"When in the business of operating a railroad, either wholly or partly within this state, on rights-of-way acquired and held exclusively by such company, or otherwise, is a railroad company."

The Supreme Court in *Hocking Valley Ry. Co. v. Public Utilities Commission* (reported in Ohio Law Reporter of Dec. 20, 1915), defined the term "interurban service," and say:

"It is obvious that the commission used the term as meaning a service consisting of cars or trains which run more frequently than any through steam-passenger service and also a service in which frequent stops are made, so that patrons need not walk far along the line to arrive at the nearest stopping place. Such a service is to be distinguished from the ordinary passenger trains of steam railroads in that the latter do not stop except at regular stations located in cities or villages, which are at intervals much greater than the stops which the evidence shows were made by the defendant on the portion of its line involved in this proceeding."

It is clear that it is not material in determining this question whether an interurban railroad is operated by steam or by electricity or other motive power. It may, if otherwise established, be an interurban railroad regardless of its motive power. Nor is it indispensable to "a railroad company" that it be exclusively operated by steam locomotives. It may be such if operated by steam, or if operated partly by steam, and partly by electricity. The test appears to be in the frequency of the service, and the

1915.]

State v. Railway.

frequency of the stops, as well as the character of the business which it carries on.

As to the frequency of the service and the frequency of the stops of defendant railroad company's motor cars, the answer, as heretofore stated, avers the number of cars operated daily over said branch during the period of time in question, and also avers the frequency of the stops, and further avers, "that the motor car service above referred to, and the time, trip, stop and tariff schedule of said service, at all times fully met and satisfied all the demands and requirements of the company's patrons and the general public. It appears from the finding in *Felicity & Bethel R. R. Co. v. Poland et al*, 10 N.P.(N.S.), 617, that company operated but one car over its line, the length of the line being eight miles. In *Railroad Co. v. Van Sanwood*, 216 Fed Rep., 252, cited in *H. V. Ry. Co. case (supra)*, held that the frequency of the service depended upon whether the convenience and necessities of the residents were sufficiently met.

The demurrer admitting the allegations of the answer that the frequency of the service and stops fully met and satisfied all the demands and requirements of the company's patrons and the general public, I am of the opinion that so far as these grounds are concerned defendant company should be classed as operating an interurban railroad at said time between Ashland and Custaloga.

A more difficult question in this case is notwithstanding the company operates an interurban railroad on the branch between Ashland and Custaloga, inasmuch as said company also operates a steam commercial railroad, and derives greater gross receipts in the operation of the steam commercial railroad than from the operation of its interurban service, whether such operations can be divided, under the excise law, and the said company be regarded in its operation as a railroad company in part, and an interurban railroad company in part.

The court in *Youngstown & Ohio River R. R. Co. v. Poland et al*, 10 N.P.(N.S.), 627, held that the railroad company should be taxed as an interurban railroad, when in fact it ought to pay a part of its tax as a "railroad company," and held it should be taxed in the two capacities.

The facts show that said railroad carried on the passenger traffic on the road by means of its electric cars; a part of its freight traffic was carried on by steam power, and a part of freight traffic carried on by electric power; that about fourteen per cent. of its gross earnings was earned by operation of steam power, and the remainder being earned by the use of electricity in hauling both freight and passenger cars. It appears that error was prosecuted to the court of appeals as to all three of said railroad cases, which court affirmed the judgments except as to the Youngstown & Ohio River Railroad Co., which latter case counsel advises the court was dismissed by the court of appeals.

The distinction as to the facts between the case at bar and the case of the Youngstown & Ohio Railroad case (*supra*) is that the gross receipts of the operation of the steam or commercial branch of the railroad in the case at bar exceed the receipts of the inter-urban branch of the road. The gross receipts of the Youngstown & Ohio River Railroad, as to the part operated by electric motor power, exceed the gross receipts of that part operated by steam. Yet the facts in the latter case show that the receipts from the part operated by electric motor power are both from the carriage of passengers and freight.

The case of *H. V. Ry. Co. v. Public Utilities* (*supra*), while it does not involve or decide the question of excise tax, yet I am of the opinion that the logic of the opinion of the Supreme Court in that case aids in reaching a conclusion in the case at bar.

The Hocking Valley Railway Co. held and operated, among other branches, a railroad line originally known as the Wellston & Jackson Belt Railway. In 1896 said Hocking Valley Railway Co. provided steam service on said line for handling freight and certain passenger train service between Jackson, Dundas and Logan, where connections were made with the main lines of said company. At about the same time electric service was introduced for the handling of local passenger traffic between Jackson and Wellston, and was later extended to Hamden.

It therefore appears that said Hocking Valley Railway Co. operated said line between Jackson and Hamden both for through service by steam, and by electric service for passenger

1915.]

State v. Railway.

service. In other words, it operated an interurban electric railroad from Jackson to Hamden, and also operated over the same line a commercial railroad for through traffic to and over its main lines, making connections at Logan. In 1914 the Hocking Valley Railway Co. gave notice of its intention to discontinue the operation of electric cars, and claimed that its steam service on said branch would answer all requirements of the traffic.

The question was whether under all the circumstances said company would be permitted to discontinue said electric interurban service, or whether the company would be required to continue the same. The public utilities commission held against the railroad company, and directed said company to continue to furnish the same interurban passenger service for the benefit and use of the public on said line. This order of the public utilities commission was affirmed by the Supreme Court.

The defendant company desires to continue its interurban service between Ashland and Custaloga. The Hocking Valley Railway Co. desired to discontinue its interurban service on its said branch, but the effort so to do was overruled, and it was forced to continue the interurban service.

The facts and circumstances are not materially different as to the two railroads, and both are chartered as "railroad companies," and not as "interurban railroad companies."

Under the ruling made in the Hocking Valley Railway case, the defendant company could not discontinue its interurban service if an intention so to do was contested.

The state in the exercise of its power to direct the continuance of interurban service by a railroad operated in both capacities, could not consistently require such railroad to pay an excise tax on the gross receipts of the interurban branch of its service of four per cent., which is the percentage provided by statute for commercial railroads.

Under the statute an interurban railroad is required to pay but one and two-tenths per cent. excise tax on its gross receipts.

From a construction of the statutes, and the authorities above cited, I am of the opinion that a single transportation operation of defendant railroad may be divided, and the defendant company regarded as "a railroad company" in part and an "inter-

urban railroad company" in part, and that the answer states facts sufficient to constitute said branch of defendant company as an "interurban company."

The demurrer to the answer is overruled.

**COMMISSION FOR SECURING SUBSCRIPTIONS TO AN
ENDOWMENT FUND.**

Superior Court of Cincinnati.

WILLIAM H. DAVIS v. OHIO MECHANICS' INSTITUTE.*

Decided, May 20, 1914.

Principal and Agent—Subscription for Endowment Fund Made—After Term of Employment of Soliciting Agent Had Expired—Institution Not Liable to Agent for Commission.

An agent was employed for the term of one year to solicit subscriptions to the building and endowment fund of an educational institution and was to be paid a commission upon all written subscriptions obtained by him and which were paid to the institution. He solicited a subscription from a prospective donor but did not obtain it nor any promise to make any subscription. More than a year after the termination of the employment, the person solicited made a large gift of money to the aforesaid building and endowment fund. *Held:* The agent is not entitled to a commission on the gift.

Clement Bates and C. W. Baker, for plaintiff.

Hunt, Bennett & Utter, contra.

PUGH, J.

Motion to direct verdict.

The plaintiff having introduced his evidence in chief, the defendant moves the court to direct the return of a verdict in its favor. The point of law involved in this motion arises

*Affirmed by the Court of Appeals in the following memorandum: "We find no error in the record prejudicial to the plaintiff in error. We think the case was properly arrested from the jury and an instructed verdict returned. The judgment is therefore affirmed." Motion for an order directing the Court of Appeals to certify its record overruled by the Supreme Court on January 25, 1916.

1915.]

Davis v. Mechanic's Institute.

upon the construction of the written contract sued upon and the testimony of the plaintiff himself, as no other witness has given evidence upon it.

On March 14, 1906, the plaintiff and defendant entered into the written agreement attached to the petition, whereby the latter employed the former to procure subscriptions to the "building and endowment fund" of the Ohio Mechanics' Institute and the plaintiff claims that, among others, he secured a donation from Mrs. Mary Emery of the sum of \$675,000, upon which he alleges that he is entitled to a commission of over \$30,000, which he seeks to recover in this action. The execution of the contract is admitted by the defendant, but it denies that the plaintiff procured the subscription alleged and that he is entitled to any commission thereon.

The plaintiff's testimony shows that on April 26, 1906, shortly after he entered upon the performance of the agreement, he wrote to Mrs. Emery soliciting a subscription and received an answer to the effect that nothing could be done in the matter during that year at least. On January 30, 1907, he wrote again to Mrs. Emery urging her to subscribe and, in reply received a note to the effect that Mr. Livingood, the writer's financial secretary, would call and talk to him about the matter. A day or two later, Mr. Livingood called accordingly, and, after some conversation, was taken by the plaintiff to the Ohio Mechanics' Institute, then located at the corner of Sixth and Vine streets in this city, and there was introduced by the plaintiff to Mr. John Shearer, then and now superintendent of the Ohio Mechanics' Institute.

As I recall it, the testimony shows that the plaintiff took no further steps toward getting a donation from Mrs. Emery, with the exception of talking over the situation, so far as she was concerned, either with Mr. Shearer or some members of the board.

The term of the plaintiff's employment as fixed by the contract, expired March 14, 1907, and it has already been decided by the court, and indeed it is admitted by the plaintiff, that there was no renewal or extension of this one-year period.

A year or two thereafter, Mrs. Emery wrote a letter to the Ohio Mechanics' Institute in which she made a donation of

\$500,000, and this was followed, still later, by the additional gift of \$175,000 which, however, was made upon certain conditions and for certain specified purposes. The plaintiff's claim in substance is that he procured Mrs. Emery to subscribe these large sums of money and this action is brought to recover his 5 per cent. upon them.

Assuming that this claim is well founded, it is objected that he did not obtain any written subscription from Mrs. Emery during the time he was employed to do so by the defendant, and is therefore entitled to no commission. The contract provides as follows:

"The period for which the employment of William H. Davis for the above purposes is made, shall be for one year from date hereof, unless the board of directors by resolution extend said time."

"The above purposes," referred to in this clause of the contract are thus set out in a preceding paragraph:

"Now therefore it is agreed between the Ohio Mechanics' Institute and William H. Davis that in consideration of William H. Davis soliciting subscriptions to the Ohio Mechanics' Institute for the purpose of a 'Building and Endowment Fund' to be used in the construction of the buildings and the equipment and endowment of the schools above mentioned, the said Ohio Mechanics' Institute agrees to pay William H. Davis 5 per cent. upon all written subscriptions obtained by him and which shall be paid to the institute."

As stated, no such written subscription from Mrs. Emery was obtained by him during the term of the plaintiff's employment.

It is contended, however, on behalf of the plaintiff, that the clause of the contract which provided for the termination of his employment at the end of the year, did not require that the written subscriptions mentioned should be obtained by him within such time. His construction of the language above quoted is that it withdrew the authority to solicit subscriptions after the expiration of one year, but that, if during such period he had dealt with and interested any one in the matter of making a donation, he could continue such dealing or negotiation

1915.]

Davis v. Mechanic's Institute.

and, if possible, obtain a written subscription at any time thereafter.

In the opinion of the court, the contract will not bear such interpretation. When the year expired, under the clause of the contract above quoted, all authority to represent the institute was automatically withdrawn from the plaintiff. He had no more right to continue dealings already begun and obtain thereafter a written subscription than he had to approach a new "prospect" and begin negotiations for the first time. The expression above used, "the employment of William H. Davis for the above purposes," included all relations of principal and agent which had existed between the parties under the contract. The entire agreement automatically ended with the expiration of the one-year period mentioned in it.

The case is not analogous to the ordinary one where an agent is employed to find a purchaser for property and wherein no time limit is fixed. In such instances, it is well established law that if the agent is discharged after he has procured a purchaser, and the principal, taking advantage of the work already done by the agent, himself sells the property to such purchaser, and that the principal has done this in order to defraud the agent, the latter is none the less entitled to his commission. But the agent must have found a purchaser; it is not enough that he has solicited some one to become such. Neither is it sufficient, in the absence of bad faith on the principal's part, that the agent be in the midst of a negotiation which promises success. He must have secured some one who, at a time before the agent's authority is withdrawn or comes to an end, is ready and willing, then and there, to buy the property, make the donation, sign the subscription or to do whatever it is the agent has been employed to solicit him to do. No pretense is made in this instance that Mrs. Emery, at any time during the contract period of one year, ever promised or even determined to do anything in this matter. Certainly the plaintiff did not, during such time, obtain her written subscription.

This being the court's view of the law applicable to the case presented by the plaintiff's evidence, it follows that the defendant's motion must be granted and a verdict be directed for the defendant.

**PRIORITY OF A SUBSEQUENT EXECUTION OVER AN
ATTACHMENT.**

Common Pleas Court of Hamilton County.

AUGUST H. BODE, JR., TRUSTEE, v. CHARLES L. RUEHRWEIN ET AL.

Decided, February, 1916.

Judgment in an Attachment—Not Prior to a Subsequent Judgment Upon Which Execution Was Levied—Attachment in Another Suit Does Not Prevent Acquiring of a Lien by Execution—Dormancy of Attachment—Subsequent Bankruptcy.

1. The provisions of General Code, Section 11708, that no judgment on which execution has not been issued and levied before the expiration of one year next after its rendition shall operate as a lien on the estate of the debtor to the prejudice of any other *bona fide* judgment creditor, apply to a judgment rendered in a suit in which an attachment was issued and levied.
2. Under General Code, Section 11663, a judgment rendered in a suit becomes dormant within five years unless an execution on it is sued out, notwithstanding the fact that an attachment was issued and levied on the judgment debtor's property. *Shue v. Ferguson*, 3 Ohio, 136.
3. If the judgment debtor is adjudicated a bankrupt, the lien of a judgment on which an execution has been sued out and levied within a year of its rendition is not lost if no further execution is sued out within five years after the first execution. *Pence, Assignee, v. Cochran*, 6 Fed., 276; *Scott v. Dunn*, 26 Ohio St., 63; *Ambrose, Admr., v. Byrne, Exr.*, 61 Ohio St., 147.
4. A judgment rendered in 1896 in a suit in which an attachment was levied on all the judgment debtor's property, but upon which no execution was sued out until February, 1902, becomes dormant and is subordinate to a junior judgment rendered in October, 1900, upon which execution was sued out and levied on November 7, 1900, although bankruptcy proceedings intervened on September 27, 1905, and no further execution was sued out by the junior judgment creditor. 3 Ohio, 136; 9 Ohio, 142; 2 Ohio St., 36; 12 C.C.(N. S.), 286.

Aaron A. Ferris, for Mersman judgment.

Stephens & Stephens, for German National Bank.

Mitchell Wilby, for trustee in bankruptcy.

Orville K. Jones, for widow.

1915.]

Bode v. Ruehrwein et al.

MAY, J.

This cause came on for hearing on a motion to distribute proceeds of property sold by the trustee in bankruptcy under the direction of the referee in bankruptcy, and involves the fixing of priorities between certain judgment creditors. The important facts are as follows:

Charles L. Ruehrwein was the owner of several parcels of real estate; on some of these there were mortgages. Before any foreclosure proceedings were brought, the defendant, the German National Bank, recovered a judgment in case No. 108614, Common Pleas Court, on December 5, 1896, having on October 29th previous caused an attachment to be issued and levied by the sheriff on all the property of Ruehrwein in Hamilton county, Ohio. The bank was made a party in 1898 in a proceeding against Ruehrwein to reform a mortgage, and in that cause, 113758, it set up its judgment and attachment, and during its pendency, more than five years having elapsed after the rendition of the judgment, it was revived December 31, 1901, and on February 10, 1902, execution was issued thereon and a levy made; and on October 8, 1906, another execution was issued but no levy made.

The defendant, Fredericka Mersman, at the October, 1900, term of the Superior Court, recovered a judgment against Ruehrwein, in case No. 50775, and on November 7, 1900, she issued an execution and caused a levy to be made on the property in question in this case. Charles L. Ruehrwein having been declared a bankrupt by the United States District Court, in case 3733, on the 27th day of September, 1905, while this judgment was in force and within five years from the levying of the execution, Fredericka Mersman, on the 17th day of October, 1905, filed her claim based on the judgment with C. T. Greve, referee in bankruptcy.

The bank contends that although it did not issue and levy an execution on its judgment obtained on December 5, 1896, that its judgment still remains in full force because an attachment had been issued and levied on October 29, 1896.

This is not the law in Ohio. There is no doubt whatsoever that there was no intention on the part of the bank to abandon

its attachment; in fact, the priority of the judgment was asserted and upheld in two cases. Nevertheless, in this state it is necessary, even where there is an attachment, in order to give a judgment priority over other *bona fide* judgment creditors, not only to issue, but also to levy, an execution on the property within one year from the rendition of the judgment.

This was expressly held in the leading case in this state, *Shue v. Ferguson*, 3 Ohio, 136, at 138:

“If there are several judgments and the property in question has not been levied on within the year under either of them, they stand on an equal footing, and the judgment creditor who first takes out an execution and causes a levy to be made will have the preference.”

In this case the Bank of the United States obtained a judgment on January 6, 1822, and made a levy on August 20, 1823. Hamberger and Sellers, in May, 1823, obtained a judgment by attachment against Ferguson, a debtor of the Lebanon bank, and on December 23, 1826, caused an execution to be levied on the land in question. Shue and Emlin obtained judgment against Ferguson December 24, 1825, and caused executions to be issued and levied December 23, 1826. In determining priorities, the court held that the judgment of the Bank of the United States was first because execution, though not levied within a year of its rendition, was still levied before December 23, 1826, the levy of Shue and Emlin; “that next in order of preference are the judgments of Shue and Emlin. Their levies were made within one year and before the levies of Hamberger and Sellers, which were not made until three years after the date of the judgment.”

It follows from the reasoning and actual decision in this case that no priority is obtained merely by attachment; there must be a levy within one year of the rendition of the judgment. See also *Humphreys v. Schlenk*, 12 C.C.(N.S.); 286; *Corwin v. Benham*, 2 Ohio St., 36; *Bank v. Coal Company*, 11 C. C., 412, affirmed 55 Ohio St., 233.

But it is claimed by the German National Bank that because it was made a party in case 113758, it was unnecessary to levy execution.

1915.]

Bode v. Ruehrwein et al.

In this state, under *Dempsey v. Bush*, 18 Ohio, St., 376, if a judgment creditor is a party in a foreclosure suit or a suit to marshall liens, it is unnecessary to issue execution to preserve the lien. But it is also the law that the judgment is a lien only on the property involved in that suit. 3 Ohio, 136, at 138; *Walpole v. Ink*, 9 Ohio, 142.

Conceding, for the sake of argument, the bank's contention that its lien is prior to that of the Mersman judgment, it can only be on the specific property involved in the case, and the property of the proceeds of which are sought to be distributed in the case at bar was not involved in that case.

Inasmuch as there is not sufficient money to pay both the bank and the Mersman judgment, the question is, which judgment has priority?

This question must be decided by reference to the statutory provisions.

Section 11663 provides that if execution on a judgment be not sued on within five years from the date of the judgment, or if five years intervene between the date of the last execution issued thereon and the time of suing out another execution, such judgment shall be dormant and cease to operate as a prior lien on the estate of the judgment debtor.

Section 11708 provides that no judgment on which execution is not issued and levied before the expiration of one year next after its rendition shall operate as a lien on the estate of a debtor to the prejudice of any other *bona fide* judgment creditor.

The bank's judgment of December 5, 1896, on which no levy was made on the property in this suit within either one year or five years, became dormant and was a dormant judgment on November 7, 1900, when a levy was made under the Mersman judgment on the property involved in this case. Therefore, that judgment is prior to the bank's judgment. 3 Ohio, 136; 2 Ohio St., 36; 12 C.C.(N.S.), 286; 11 C. C., 412, affirmed 55 Ohio St., 233.

The bank further contends that even if it lost its priority in 1900, that because it levied an execution in 1902 on its revived judgment and issued another execution in 1906, it is at least equal in right with the Mersman judgment, if not superior, be-

cause no execution was levied under the Mersman judgment after November 7, 1900.

Mersman contends, and properly so, that because the judgment debtor, Ruehrwein, was declared a bankrupt on September 27, 1905, within five years of the levy, it is unnecessary to issue and levy an execution thereafter.

Such is the law of Ohio. Under the bankruptcy law, Section 64b, subdivision 5, priority is given to "debts owing to any person who by laws of the state or United States is entitled to priority."

In *Pence, Assignee, v. Cochran et al*, 6 Fed., 276, the District Court of the United States sitting in this district held that the priority of liens of judgments is to be determined as they existed at the date of the adjudication in bankruptcy. The court then cites with approval the decision of the Ohio Supreme Court, in *Scott v. Dunn*, 26 Ohio St., 63, wherein it was held that under the assignment law regulating the administration of assignments (now General Code, Section 10809) the priority of judgment liens is to be determined as the liens existed at the time the assignment took effect.

In *Ambrose, Admr., v. Bryne*, 61 Ohio St., 146, the court approved the principle laid down in *Scott v. Dunn, ubi supra*, holding:

"Where a judgment is a subsisting lien on the lands of the debtor at the time of his death, it is not necessary thereafter to issue execution upon it in order to preserve the lien. It is entitled to share in the proceeds of the land, when sold by the personal representative, according to its priority at the time of the debtor's death, although execution be not issued within five years from its rendition or the date of the last execution."

For these reasons it is ordered that after the payment of the costs, including compensation to the trustee in bankruptcy and the widow's dower, the Mersman judgment be paid first, and if there is any balance it be applied to the payment of the judgment of the German National Bank.

1915.]

Wynne v. Traction Co.

**LIABILITY FOR INJURY TO A WAGON BOY IN A COLLISION
WITH AN ELECTRIC CAR.**

Common Pleas Court of Hamilton County.

JOHN WYNNE, GUARDIAN OF JAMES RUSSELL WYNNE, AN INFANT,
v. THE CINCINNATI TRACTION COMPANY AND THE
ADAMS EXPRESS COMPANY.*

Decided, March 7, 1914.

*Negligence—Question of Joint Enterprise as Between a Driver and His
Wagon Boy—Whether They Were Fellow-Servants Was a Proper
Question for the Jury Under the Testimony and Proper Instruc-
tions by the Court—Excessive Verdict.*

In a collision between a wagon belonging to an express company and loaded with express packages and an electric car, the wagon boy, aged fourteen, whose duty it was to stand on the tail gate of the wagon and watch the load and help the driver to unload when called upon so to do, was thrown under the car and lost a leg. *Held:*

1. The driver of the wagon and the boy were not engaged in a joint enterprise of a character which would permit the negligence of the driver, or the combined negligence of the driver and the motor-man of the car, to be imputed to the boy.
2. Whether the driver and the boy were fellow-servants, or the position of the boy was subordinate to that of the driver, was a question for determination by the jury under proper instructions by the court.
3. A verdict of \$15,000 in favor of a boy for the loss of a leg is unusually large, and in view of the fact that the jury were probably induced to increase their award by testimony as to the likelihood of the boy being compelled to undergo a second amputation of the injured limb, the court grants a remittitur of \$5,000.

*Paxton, Warrington & Seasongood, Robert S. Marx, Robert-
son & Buchwalter and Theo. C. Jung, for the motion.*

Littleford, James, Ballard & Frost, contra.

NIPPERT, J.

Decision on motion for a new trial.

*Affirmed, except as to the amount of damages to be allowed, *Cincinnati Traction Co. v. Wynne*, 25 C.C.(N.S.), —.

The facts in this case are about as follows:

On the evening of November 7, 1911, James Russell Wynne, a minor aged fourteen years, and while in the employ as "wagon boy" of the Adams Express Company, one of the defendants in this action, was standing on the tail gate of one of the express company's wagons, which was being driven westwardly on Ninth street, loaded with packages to be delivered at the L. & N. freight depot, and while this wagon was crossing the intersection of Ninth and Freeman avenues the said wagon was struck by a car of the defendant, the Cincinnati Traction Company, causing the said minor to be thrown under the wheels of the street car, crushing his left leg so that it had to be amputated about three inches below the knee.

The minor, through his father, John Wynne, as guardian, brought suit against the Cincinnati Traction Company, as well as against the Adams Express Company, charging negligence against both companies, and recovered a verdict of \$15,000 against both of the defendants. This verdict is now sought to be set aside upon motion of both companies.

The Cincinnati Traction Company, while admitting that there was a collision between one of its cars and a wagon belonging to the Adams Express Company at the intersection of Ninth and Freeman avenues, and admitting plaintiff's injuries, denies its own negligence and sets up as its defense to the plaintiff's allegations "that the injuries were caused by his own concurring and contributing negligence and in connection with the concurring and contributing negligence of the driver of said wagon."

The Adams Express Company in its answer admits the employment of the minor as a wagon boy, and "that among his duties as such wagon boy he was at times required to ride on one of the wagons of this defendant," and that on the evening of the accident he was riding on one of the express company's wagons and that a street car of the defendant traction company violently ran into and collided with the wagon of the defendant express company, causing the injuries complained of by plaintiff, and that said injuries were due solely to the carelessness and negligence of the defendant traction company in operating its car at a careless and very rapid rate of speed, and

1915.]

Wynne v. Traction Co.

that the motorman failed to have the car under proper control, failed to sound the gong or in any manner give proper and due warning of the approach of said car towards Ninth street, and that the motorman carelessly and negligently failed to keep a lookout as the said street car approached said street intersection, and that the defendant traction company, in the exercise of ordinary care, could have avoided the collision, which the Adams Express Company in the exercise of ordinary care could not have avoided.

The plaintiff, in reply to the second defense of the Cincinnati Traction Company, denies that the negligence of the minor contributed to or concurred in causing his injuries and further denies any negligence whatsoever.

Both the Cincinnati Traction Company and the Adams Express Company have filed a motion to set aside the verdict and are asking for a new trial.

It appears, however, that the defendant, the Cincinnati Traction Company, seems to rely strongly for its ground for a new trial upon the refusal of the court to give a certain special charge (No. 3) requested by the Cincinnati Traction Company, touching upon the question of joint enterprise, as follows:

“The driver and plaintiff were taking an active part in a joint enterprise, namely, the transportation from one depot to another and intended delivery into a railroad car of the load of freight on the express wagon. This being so, the negligence of the driver, if any, is imputed to the plaintiff, so far as concerns the defendant, the Cincinnati Traction Company, and if the accident to the plaintiff was caused either solely by the negligence of the driver of said wagon or by the combined negligence of the driver and motorman, the plaintiff can not recover against the defendant, the Cincinnati Traction Company.”

While this defense of “joint enterprise” has not been specially pleaded and while the court believes that in order to take advantage of this defense it should have been specially pleaded, still, even in that case the court do not agree with counsel for defendant in their contention that the enterprise in which the driver of the express wagon and the enterprise in which the wagon boy of the express company were engaged at

the moment of the accident can be considered of such a nature as to warrant the court to instruct the jury as a matter of law that they were engaged in a joint enterprise, and therefore the special charge requested, as set out above, was properly refused.

The court further believe that there was no evidence of sufficient force to warrant the court to charge the jury that if the jury should find that they were engaged in a joint enterprise that the plaintiff could not recover, for, as stated at the time of the trial, the court did not feel warranted to give the charge on the question of joint enterprise because the respective duties of the driver of the wagon and the wagon boy at the time of the accident were not of such a character as to impute the negligence of the driver of the horses, a man about thirty-six years of age, to a wagon boy, aged fourteen, whose duty it was at that time to stand on the back of the wagon and watch the packages intrusted to his care.

To sustain the contention of the traction company in this respect, counsel urges very strongly the doctrine laid down in *Railroad Company v. Kistler*, 66 Ohio State, page 326, where the court say:

“While the doctrine of imputed negligence does not prevail in this state, yet where two or more persons take an active part in a joint enterprise, the negligence of each, while so actively engaged, must be regarded as the negligence of all.”

But the facts presented in the Kistler case are entirely different from the facts presented here. In the former, the driver of the wagon and father of the plaintiff being nearly deaf took the daughter along to hear for him, and as they neared the railroad track he told her to look and listen for trains while he was attending the horses. The daughter did her part of the enterprise in a manner so negligent and careless that it resulted in the accident which formed the basis of that suit. The father and the daughter were engaged in a joint enterprise, as the evidence plainly showed, and each in that case would be chargeable with the negligence of the other. But in the case at bar

1915.]

Wynne v. Traction Co.

there was not a scintilla of evidence before the jury which would warrant them to consider whether or not at the moment of the accident the wagon boy and the driver were engaged in a joint enterprise. On the contrary, the testimony of the driver showed that the management of the horses, the driving of the same, their speed, etc., was exclusively within his power and jurisdiction, and that the wagon boy had absolutely nothing to do with the team or the driving of the same; that he was not anywhere near the driver at the time; that at the time of the accident the wagon boy was attending strictly to his duties as laid down by the rules of the Adams Express Company in standing upon the rear end of the wagon "watching the load" and to guard against any packages being lost or stolen. The testimony shows that the load at the time was a fairly heavy one, consisting of a great number of large and small packages. The mere fact that the driver had the right to call upon the wagon boy, upon reaching his destination, to assist him in unloading the wagon, can not be construed so as to warrant the court to instruct the jury upon the question of joint enterprise at the moment of the accident and thus impute the negligence of the driver of the horses to the wagon boy.

The principle in the Kistler case would no doubt apply if there had been any evidence to the effect that the wagon boy, instead of being on the rear of the wagon where his duty called him, was on the seat with the driver, that he assisted the driver, and that he, in conjunction with the driver, was charged with the management of the team and the safe progress of the wagon across the streets of the city. But the evidence conclusively shows that it was the duty of the wagon boy always to be stationed on the rear end of the wagon and to watch the packages in transit, that is, the contents of the wagon, while the duty of the driver was to look after the progress of the wagon and the management of the team through the streets of the city.

Another rule of the express company, introduced in evidence, is Rule No. 10, which reads as follows:

"Drivers must never permit any one else to handle their teams." * * *

The courts of our state have not gone as far in applying the doctrine of imputed negligence as some of our sister states, and as the case at bar and the Kistler case bear little or no resemblance, the court does not feel it committed error in its failure to submit to the jury the question of joint enterprise.

The main ground urged by the defendant, the Adams Express Company, in its motion for a new trial, is the refusal of the court to charge on the question of fellow-servant as follows (special charge No. 6):

"The driver of the wagon on which the plaintiff was riding at the time of the accident, found the plaintiff employed as wagon boy by the Adams Express Company, at the time he was assigned to said wagon as driver.

"The driver had control of the operations of such wagon, and his duties were to drive the team, load and unload the wagon, collect, transfer and deliver express.

"The duties of the plaintiff were to help load or unload the wagon, if necessary, to stand on the rear of the wagon, when loaded, to watch the express on such wagon, and in the absence of the driver to watch the team.

"The driver and the plaintiff were thus taking an active part in a common service of the Adams Express Company, that of the collection, delivery and transfer of express packages, and were thus fellow-servants, and your verdict must be in favor of the Adams Express Company."

In other words, the Adams Express Company requested the court to charge that the driver and the wagon boy being fellow-servants, the boy could not recover on account of the negligence of his fellow-servant, the driver.

The court refused to charge as requested, but did submit the question of whether or not these two employees were fellow-servants, and stated to the jury that—

"Where different persons are employed by the same principal in a common enterprise and no control is given to one over the other, then no action can be sustained by them against their employer on account of any injuries sustained by one employee through the negligence of the other; but when one servant is placed by his employer in a position of subordination and subject to the orders and control or direction of another servant,

1915.]

Wynne v. Traction Co.

and such inferior servant, without fault and while in the discharge of his duties, is injured through negligence of the superior servant, then in that case the master is liable."

And the jury were instructed to consider these principles of law in connection with the testimony of the driver, the wagon boy, and the rules of the company as far as they were admitted in evidence, and if they found that the driver had neither the power nor the authority to direct or control the actions or conduct of the boy, then the wagon boy and the driver would be considered fellow-servants, and the plaintiff could not recover; but if they should find from the evidence that the defendant express company had placed the wagon boy in a position of subordination to the driver and that he was injured without fault of his own, through the negligence of the superior servant • • • then the defendant express company would be liable for any injuries thus caused.

This placed the question of whatever relationship the plaintiff may have sustained to the driver of the wagon squarely before the jury and to have done otherwise would have been, in the opinion of the court, serious error.

We believe that the special charges requested by the Adams Express Company, and refused by the court, were properly refused, and the motion for a new trial based upon these grounds is therefore overruled.

Counsel for defendants insist that the court erred in a number of instances in the general charge.

The court has given considerable thought to this complaint. It may be well for counsel to realize that this was a case which brought into discussion an unusual number of technical questions of law—the jointure of the two companies as parties defendant, the relationship of the minor plaintiff to the other employee of the express company, the nature of the enterprise in which each of them was engaged at the time, the relative rights of the traction company and the Adams Express Company as users of a public thoroughfare, the negligence of the motorman, the imputed negligence of the driver and the contributory negligence of the plaintiff. As to the latter, it may

be stated at this point that there was not sufficient evidence to warrant the court to submit to the jury the question of the plaintiff's contributory negligence, though the court did include such an instruction as a part of the charge, even though at this time the court can not find anything in the record that would warrant such an instruction. So, the defendants have no complaint to make in this respect.

As to the other exceptions to the general charge, taken by the defendants, the court has attempted to follow as nearly as possible the rules of law laid down in the recent decision of our Supreme Court in *Steubenville & Wheeling Traction Company v. Brandon*, 87 Ohio State, 187.

Another ground urged by defendant's counsel in support of the motion for a new trial is the alleged misconduct of counsel for plaintiff.

While the court recognizes that plaintiff's counsel, in the heat of the trial of this case, did propound a question to one of the defendant's witnesses which, in the opinion of the court, was not proper, yet it was not of such a nature as to warrant the court to do anything further than to reprimand counsel and to instruct the jury to disregard the question propounded to the witness.

The court recognizes the right of counsel to conduct cross-examination of the witness in his own way as long as counsel observes the rules of evidence and the ethics of his profession. The mere fact that a question is improper and objected to by opposing counsel before the witness has answered, and the court has ruled on same and has instructed the jury to disregard the question, will not be sufficient to warrant the court to set aside a verdict, and the motion of the defendants in asking for a new trial on that ground is therefore overruled.

In the controversy which subsequently arose between counsel in the presence of the jury, one side was as guilty as the other in failing to observe the proprieties of the courtroom; and the taking of exceptions to the court allowing either counsel to have their respective exceptions put in the record merely had the effect of placing too much emphasis upon the alleged mis-

1915.]

Wynne v. Traction Co.

conduct complained of, and the court feel that both counsel went further than necessary under the circumstances; but there was nothing of sufficient importance in this entire incident which would warrant the court to grant a new trial.

Another ground urged upon the court in the motion for a new trial is the fact that during the progress of the case one of the jurors complained about a pain in his limb, but which the juror himself admitted was not of sufficient consequence to keep him from giving the case his undivided and careful attention—this in response to the court's inquiry, and the court can find no factor in this point of sufficient force which might be prejudicial to the defendant.

Under Section 11576, General Code, a verdict shall be vacated and a new trial granted if excessive damages appear to have been given under influence of passion or prejudice.

The amount awarded by the jury, to-wit, \$15,000, is an unusually large one considering the nature of the injury. It is the purpose of the law not to punish the defendant companies for an injury not wilfully inflicted, but to compensate the plaintiff as far as money will do so. There is no total disability here; in fact, the injury is of such a nature as to merely place a limitation upon plaintiff's bodily activities—his field of personal endeavor as far as office work, clerking, stenography, or even professional work, is concerned has not be circumscribed, and verdicts for similar injuries and of much smaller amount than recovered here have been subsequently reduced by the court on the ground that the law will only demand reasonable compensation for the injury done to plaintiff.

The court recognizes that no amount of money will compensate this boy for the loss of his leg, yet it will not do to have the jury give way to fancy instead of logic when assessing compensation, even though, as in this case, there was not a scintilla of evidence showing contributory negligence on the part of the unfortunate plaintiff. On the contrary, the testimony showed conclusively that the boy was discharging his duty in every respect as a faithful employee of the defendant express company. Unfortunately, however, the injured limb has not healed prop-

erly and it is very likely that the plaintiff will have to undergo a second operation so as to prepare the stump for an artificial leg and permit plaintiff to do away with the use of crutches. The court upon special request of *defendant's* counsel charged fully upon this phase of the case and the jury no doubt, in reaching its verdict, felt that substantial compensation should be given plaintiff for pain and suffering incident to such second operation and included in its consideration the element of risk connected with such additional amputation. In considering this phase of the case the court feels that in urging upon the jury the consideration of this question of a second operation the jury were unduly impressed with the risk involved and that in this respect a too heavy burden was placed upon the defendant companies, though the charge was properly given.

Taking the case as a whole, the issues were fairly presented to the jury, the case was ably conducted by both of the defendant companies, as well as by the plaintiff, the jury was one of unusual intelligence and caliber, and the court is of the opinion that the motion for a new trial should be denied, providing the plaintiff agrees to a remittitur of \$5,000, leaving a verdict of \$10,000 upon which judgment will be entered; otherwise a new trial will be granted.

1915.]

State, ex rel, v. Krause et al.

**UNAUTHORIZED APPOINTMENT OF PHYSICIAN TO ATTEND
QUARANTINED SMALL-POX PATIENTS.**

Common Pleas Court of Marion County.

STATE OF OHIO, ON RELATION OF DANA O. WEEKS, v.
H. C. KRAUSE ET AL.*

Decided, November 25, 1914.

*Municipal Law—Employment of Physician by City to Attend Upon
Cases of Contagious Disease—Sections 4408, 4410 and 4436 of the
General Code Construed.*

1. The board of health of a city is not authorized to contract for the general employment of a district or ward physician to attend upon cases of contagion, unless such employment is authorized or consented to by action of the city council.
2. Where a physician is employed by the board of health, without consent of the city council, to attend upon all cases of small-pox existing or thereafter developing in the city, during the term of his employment, such contract is illegal and void, and mandamus will not lie to compel the council to provide payment for services rendered thereunder.

*Crissinger, Guthery & Strelitz, for the relator.**Carhart & Warner, contra.*

BALDWIN, J.

In this action the relator asks a peremptory writ of mandamus commanding the members of the council of the city of Marion to enact the necessary legislation and make an appropriation of funds to pay his claim against the city in the sum of \$1,500 and interest.

Upon the filing of the petition an alternative writ was allowed and served upon respondents requiring them to either proceed with the necessary action looking to the payment of the claim, or show cause why they have not done so.

Respondents took no measures to provide for the payment of relator's claim, but filed their answer setting forth several rea-

*Cause dismissed in the Court of Appeals on a question of jurisdiction.

sons why they decline and why they should not be required to do so. Relator replies to this answer, and thus the issue is presented.

There is little or no dispute of fact in the case, the real issue being one of law.

The facts either admitted by the pleadings or found by the court from the evidence which are essential to the determination of the question involved are these:

The relator, who is a physician residing in the city, was on the 13th day of June, 1913, by resolution adopted by the board of health of the city, employed to give medical attendance to those sick of small-pox and quarantined on account thereof, his compensation being fixed at \$15 per day. He entered upon this employment and continued therein until November 19, 1913. During this time the board of health by similar resolution changed the *per diem* rate of compensation, leaving the employment the same in other respects.

During this period the relator daily visited the quarantined patients and ministered to their wants substantially as claimed, and when he quit this service, his compensation computed, at the rates stated in the resolutions of the health board, amount to \$1,500.

Relator thereupon presented his bills for that sum to the board of health, which allowed and approved the same and certified its action to the city council in due form of law. Whereupon an ordinance was introduced in council to provide the funds from which relator's claim could be paid. This ordinance was read at two meetings and coming up for final action on the third reading failed of adoption.

It is expressly admitted that during all the time of the rendition of the service for which relator claims, he was the health officer of the city, duly appointed by the health board, and that at the time of the approval of his claim, relator was a member of the health board.

Among the reasons asserted by respondents for refusing the legislation asked is that the relator's claim is fraudulent in that he charged for services not rendered. In any view, if fraud

1915.]

State, ex rel, v. Krause et al.

intervened in the assertion of or procuring the allowance of the claim, the relator would have no standing as an applicant for mandamus. The evidence adduced falls far short of supporting this position of the respondents. It very satisfactorily appears that the relator upon each of the days for which he claims, rendered *some* medical service to quarantined patients. It is true that on many of the days he did little work of consequence, but he appears to have been on the job performing such service as was necessary. It is not for the court to determine in this action whether the contract attempted to be made by the board was wise, prudent or extravagant, or whether the services were worth the sum agreed to be paid in the contract of employment attempted to be made. The court is unable to find that the bills allowed contain any fictitious item, or that any fraud was practiced in procuring the allowance and certification thereof by the board of health.

It is entirely clear that for all obligations incurred by the board of health, within the scope of the authority conferred upon it by law, the city is liable, and that the city council has no right of revision or discretionary authority over the allowances made by the board within its conferred powers. Section 4451, General Code.

This case must therefore turn upon the question of the authority of the board, under the law, to incur the obligation asserted in the manner attempted.

This authority depends upon the construction of Sections 4408, 4410 and 4436, General Code.

It is urged by relator that his employment is authorized by Section 4436, and that he was employed thereunder, and that the board having approved and certified his bill for services the claim is liquidated, and nothing remains to be done except for the council to provide for its payment.

The relator expressly disclaims in his reply any employment as a ward or district physician under the provisions of Section 4408, General Code, and surely he was not so employed, because such employment or appointment could only be made by and with the consent of the council, and such consent was not procured.

According to the allegations of the petition and the facts proven, relator's employment was not to attend upon any single or isolated case, but it was general, to look after all small-pox cases in the city, and in fact he did attend upon all, numbering for the whole time some fifty or more quarantined cases.

The service thus performed, so far as relates to indigent persons (and all are alleged to be of that character), is such as is specifically provided for and enjoined by Section 4410 as a duty of a ward or district physician, appointed by the board under Section 4408.

The "district" for which a physician may be employed, may embrace such territory as the board prescribes—either some portion of, or the entire territorial limits of the city. In this instance the entire city was constituted the district.

Now, can a board of health legally appoint or employ a physician, clothing him with all the authority and attributes of a "district physician," and in fact making him such, without conforming to the express provision of Section 4408, which requires the consent of the council to such appointment?

I think not. Such course would be an evasion of the law and a disregard of the check and protection against abuse in such appointment which the Legislature has provided in requiring the sanction of council to such appointments.

The section relied upon by the relator, Section 4436, General Code, while it requires "medical attendance" to be furnished to persons quarantined in any house or place, does not attempt to prescribe the method of employment of physicians to perform that service, or to confer authority on the board so to do, presumably because such authority and the manner of its exercise had been explicitly defined in preceding sections of the chapter, viz., 4408 and 4410.

The object of Section 4436, as viewed by this court, in so far as it relates to medical attendance, is to enjoin the duty upon the health board to provide to those quarantined this attendance, which under the former sections they were authorized to employ with consent of the council, and to provide a method of reimbursement to the city for expense thus incurred, if the parties for whom the service was rendered are able to pay therefor.

1915.]

State, ex rel, v. Krause et al.

If it can be said that both Sections 4408 and 4436 authorize the employment of physicians to attend upon quarantined cases, the one section providing only a general authority and the other a specific method to be pursued in making such employment, under the familiar rule of statutory construction the specific provision will prevail over the general provision.

So that viewed in either aspect the conclusion seems irresistible that the appointment or employment of the relator was not authorized by law, in the manner in which it was done. Hence no duty devolved upon the respondents as members of the council to provide for the payment of relator's claim, for which mandamus would lie under the provisions of Section 12283, General Code.

This conclusion disposes of the case, but in passing it is proper to say that in the opinion of the court, and without entering upon any discussion thereof, none of the other reasons given for non-compliance with the relator's demand are well taken.

As to one of the grounds, however, in view of the position taken by counsel for respondents and seemingly acquiesced in by counsel for relator, an explanation may be in order.

Respondents contend that if relator was employed at all, the employment must be as a ward or district physician, under Section 4408, and that he was ineligible to such appointment because he was at the time health officer of the city, and in support of this contention the act of April 25th, 1904 (97 O. L., 331), is cited. Such appointment is expressly inhibited by that act, but unfortunately for the argument, that act was carried into the General Code as Sections 4408 to 4412 inclusive, and by the act of March 15th, 1911 (102 O. L., 44), Section 4412, which contained the provision relied upon, was repealed and amended. In its amended form it provides "No member of the board of health shall be appointed health officer, nor shall a member of the board of health, *not* the health officer, be appointed as one of the ward physicians."

The literal reading of this amendment does not render the health officer ineligible to appointment as a ward physician. There is a palpable error somewhere, for manifestly it was in-

tended that the word printed *not*, should be *nor*. In this same erroneous form the amended section appears in Page & Adams' version of the statutes.

But this is not all. The Legislature in its wisdom, progressiveness and zeal for the public welfare, by the civil service act of April 28th, 1913 (103 O. L., 698, repealing Section 32, page 713), repeals Section 4412 in its entirety, at the same time providing (Section 31) for the indefinite continuance for certain purposes of its provisions. Couple this with the provisions of another civil service act, which places a physician in the unclassified service, and consider also the other act relating to board of health employees, found in 103 O. L., 436, and apply to all these new acts the new constitutional provision, Article II, Section 1c, that no law shall go into effect until ninety days after it is filed in the office of the Secretary of State by the Governor, and you have something to guess upon to determine what was the law of Ohio on this subject on the 13th day of June, 1913.

This may afford an added reason why the relator's right to the writ is not clear.

Without passing upon the question as to whether or not the relator may maintain an action on the common counts to recover a *quantum meruit* or *quantum valebant*, because not involved, the finding is that the peremptory writ should be and is refused and the petition dismissed at the costs of the relator.

Judgment accordingly.

1915.]

Kirby v. Kerr Turbine Co.

JUDGMENTS NISI IN ACTIONS IN ATTACHMENT.

Common Pleas Court of Cuyahoga County.

E. R. KIRBY v. THE KERR TURBINE COMPANY.

Decided, February, 1916.

Procedure in Attachment and Garnishment—Jurisdiction Not Lost in an Action Against a Non-Resident Defendant—By the Filing of an Answer by the Garnishee that It Has no Property in Its Possession Belonging to the Defendant—Sections 11851 and 11853.

In an action in attachment against a non-resident a conditional order or judgment nisi may be entered for the full amount owing to the plaintiff, notwithstanding the garnishee had no notice of the hearing and has previously answered that it had no property or credits belonging to the defendant in its possession or under its control.

FORAN, J.

On November 2, 1914, plaintiff filed a petition in this court against the defendant, a non-resident of the state of Ohio, alleging there was due him on a written contract the sum of \$2,970.96.

On November 23, 1914, the plaintiff filed an affidavit for attachment, averring that the First National Bank of Cleveland, Ohio, had in its possession money belonging to the defendant, not exempt from execution, and was indebted to the defendant; upon which affidavit an order of attachment was obtained and issued, and service had upon the First National Bank, as garnishee, November 23, 1914.

The garnishee did not answer, but on December 15, 1914, the defendant, by counsel, appearing only for the purpose of the motion, moved to discharge the attachment, for the reason that the affidavit was insufficient in law. On January 9th, 1915, a similar motion was filed. In the meantime the plaintiff had filed an alias affidavit for attachment, and an order was issued thereon. Both these motions were granted January 18, 1915, apparently for the reason that the affidavits did not negative paragraph 1 of Section 11819, General Code.

On January 16, 1915, the plaintiff filed a pluries affidavit for attachment, and an order was issued thereon and served upon the First National Bank of Cleveland, on January 18, 1915.

On February 15, 1915, the garnishee, the First National Bank of Cleveland, filed its answer, averring that "neither at nor after the time of the service of the order and notice of attachment herein had this garnishee any property of any description or credits of the defendant in its possession or under its control." Service by publication was duly had upon the defendant, and filed January 8th, 1915.

On January 6th, 1916, the cause was regularly assigned for hearing, and the defendant being in default of answer or demurrer, a hearing was had, and the court found *prima facie* that the garnishee did have money and property in its possession belonging to the defendant, and was indebted to the defendant, and that there was due to the plaintiff from the defendant the full amount claimed in his petition. A finding or judgment *nisi* was accordingly entered. Before the journal entry was filed, and on January 8th, 1916, a motion was filed by the garnishee to vacate and set aside the order and judgment *nisi*, for the reason that the garnishee, the First National Bank of Cleveland, Ohio, "was not notified of the hearing in the garnishment process" in accordance with the rules of the court.

It is admitted that the garnishee was not notified and did not have notice of the hearing.

If the garnishee is a party to the action, either in fact or in effect, or if the garnishee is concluded by the finding or judgment *nisi*, the motion should be granted. The plaintiff contends that the garnishee is in no respect a party to the action, and is not concluded by the order of the court. Counsel for the garnishee admit that the finding and judgment of the court was wholly conditional upon the assumption that the bank has in fact money and property in its hands belonging to defendant; but counsel contend that the garnishee should not be subjected to the cost and inconvenience of defending a civil action which it is admitted must be brought to determine that question. If the bank or garnishee has a right to come into this action and have the question of its liability to the defendant litigated, it

1915.]

Kirby v. Kerr Turbine Co.

would seem that the inconvenience would be precisely the same as it would be if a civil action or separate action were subsequently brought against it to determine whether it did or did not have in its hands or in its possession moneys or credits belonging to the defendant. It would be a matter of defense in either case; and as to costs, it is provided by Section 11852 that if the plaintiff proceeds against the garnishee by action because his disclosure is not satisfactory, and fails, he must pay the costs, unless it appears the answer or disclosure was incomplete. But can it be said that the garnishee is in any sense a party to the action? The right of attachment by garnishment is not a common law remedy. Its validity and effect depend wholly upon statutory provisions.

The word garnishment is of Teutonic origin, represented in old English by the word *warniam*, meaning to take warning or to beware. The meaning of the word as seen in the law term garnishee is, that a person who owes or holds money belonging to another is warned by order of court not to pay it to his immediate creditor, but to a third person who has obtained or may obtain final judgment against that creditor.

In the words of *Shinn on Attachment and Garnishment*, Volume 2, Section 471:

“The garnishee, however, has no such active interest in the determination of the suit as the defendant has in ordinary suits. He has often been pronounced to be only a stakeholder or custodian of the funds or property in his hands, for the one or the other of the litigants as the case may determine. He has no pecuniary interest in the matter, no costs to pay and none to save. His business is to let the law have its course between the litigants, and he is not permitted to do anything to change his position toward either. He is only bound to disclose the truth as to them. He is not permitted to interfere between the plaintiff and the defendant, and the only question to be determined as to him is whether he is indebted and can safely pay. He is at most a qualified defendant. It is a matter of no concern to the garnishee which party shall succeed or to whom he shall pay the money due from him to the defendant. It is his business to stand aloof from the contesting parties and to bind himself to the separate interest of neither. He is entirely indifferent as between them, and can properly do nothing to aid either party in the litigation.”

The garnishee is not required or called upon to make any defense as between the plaintiff and defendant. *Moore v. Chicago, etc., R. R. Co.*, 43 Ia., 385. He is presumed to be absolutely neutral and wholly indifferent as to who shall have the money or property in his hands. So far as the garnishee is concerned, the plaintiff is in effect substituted for the defendant or principal debtor, and the proceeding is in the nature of a suit by the defendant against the garnishee, and therefore the garnishee should set up in his answer every defense he might invoke against the defendant or principal debtor. His disclosure or answer should be full and complete; and he should state every fact within his knowledge that has destroyed the relation of debtor and creditor, if such relationship previously existed between him and the defendant or principal debtor, without ambiguity or equivocation of any kind.

It can not be said that the answer of the First National Bank, garnishee in this case, measures up to these requirements. What it says is that "at and after the time of the service of the order and notice of attachment, it did not have any property or credits of the defendant in its possession or under its control." If this is an admission that it did have property of the defendant in its possession before the service of the notice, it might be interesting to know just how and when it parted with such property or credits. Besides, the garnishee had service or notice of the plaintiff's claims on November 23, 1914, and again on December 21, 1914, as service of the order was had upon it on these separate dates. We are not informed as to which service or notice the answer refers. It may be claimed that because the first and second service or notice were predicated upon a defective affidavit, the garnishee may avail itself or take advantage of this error in the proceedings and file an answer to meet either notice or service. But this is a defense available to the principal creditor or the defendant, and does not concern the garnishee in this action. If the garnishee is sued by the plaintiff because its answer is not satisfactory, it would have a right to inquire into the proceedings against the defendant; for if no valid judgment were rendered against the defendant, the garnishee would not be protected if it surrendered property belonging to the de-

1915.]

Kirby v. Kerr Turbine Co.

defendant on such invalid or void judgment; and as the jurisdiction of the court to render such valid judgment against the defendant depends largely upon the relation of debtor and creditor existing between the garnishee and the defendant, the necessity for full and honest disclosure as to these relations becomes at once apparent.

Section 11828, General Code, provides for service upon the garnishee. And by Section 11830, General Code, it is provided that the answer of the garnishee shall be made before the clerk of the common pleas court of the county in which the garnishee resides. The statute does not specifically state just when the garnishee shall answer. But the fact that the garnishee in this case was served with notice of the plaintiff's claim on November 23 and again on December 21, 1914, and subsequently on January 8, 1915, and did not answer until February 15, 1915, seems to indicate that the garnishee was especially anxious as to the rights of the defendant or principal debtor. In other words, the garnishee was anticipating a defense it would have a right to make when a civil action was brought against it if its answer was unsatisfactory. Section 11830, General Code, provides that a special examination of the garnishee shall be had, and actions against him, for failure to appear or to answer satisfactorily or to comply with the order of the court, may be brought.

A good deal of confusion has arisen as to the construction of this section. It must, of course, be conceded that if the answer of the garnishee is unsatisfactory, the plaintiff may ask the court for an order to examine the garnishee, either in open court or by a referee or commissioner. But in view of the other sections of the statute, the plaintiff is not bound to invoke this remedy. By Section 11851 it is provided that if the garnishee fails to appear and answer, or if he appears and answers and his disclosures are not satisfactory to the plaintiff, or if he fails to comply with any order made by the court as to the property in his hands, or to give the bond required by the statute, the plaintiff may proceed against him by civil action, "and thereupon such proceedings may be had as in other actions, judgment may be rendered in favor of the plaintiff for the amount of the property and credits of the defendant in the possession of the garnishee, for what may appear to be owing by him to the defendant, and for

costs of the proceedings against the garnishee." So that it seems the plaintiff may elect either of these remedies.

The contention that the garnishee has a right to come into the action against the principal defendant and have the question litigated as to whether he owes or does not owe the principal debtor or defendant, is not well taken under the practice of this state. Such practice does, however, obtain in other states or other jurisdictions, but the practice is based upon statutory provisions different from the statutory provision relating to attachment in this state. The reason for this is quite apparent. If the plaintiff in this action had obtained an order from the court for an examination of the garnishee, either in open court or by commissioner, and was not satisfied with such examination, and the court was of the opinion that the answers of the garnishee were not satisfactory, there is no provision by which a judgment could be rendered against the garnishee in the action against the defendant. The question as to whether the garnishee had money or credits in its hands belonging to the defendant may be one of fact, and upon this question of fact the garnishee would be entitled to his day in court and trial by jury; and in the very nature of things the garnishee could not be concluded by any action which the court could take in the original action against the defendant or original debtor. In an action for attachment the garnishee is not a proper party under the practice of this state, and a final judgment in the action can not be recovered against him, but, on the contrary, he sustains the relation of witness; and while an order to pay may be based upon his answer, yet as he may interpose any defense he may have against the action, notwithstanding the order, the court would have no power to compel him to pay money into court in the action originally brought against the defendant. In other words, the garnishee is not a party to an attachment proceeding so as to either conclude the plaintiff or other creditors by his answer or failure to answer. A denial by the garnishee that he has any property would not destroy the jurisdiction of the court. See 4 C.C.(N.S.), 585; 39 O. S., 218; 21 O. S., 221.

In the case of *Goodrich H. Barbour v. H. H. Boise et al*, 9 O. D., 332, a case decided by the superior court of Cincinnati, it was said:

1915.]

Kirby v. Kerr Turbine Co.

"If, under the provisions of Section 5551 (11851, General Code), Revised Statutes, the garnishee disregards the order of the court, suit may be brought against him to enforce the order made in the garnishment case, yet under Section 5553, Revised Statutes, no judgment can be rendered against the garnishee in such suit until the action against the defendant in attachment is determined. This makes the final judgment in the auxiliary suit to enforce the order depend upon the judgment in the attachment suit."

And again in the fourth syllabus it is said:

"It is the right and the duty of the garnishee to see that jurisdiction is rightfully acquired by the court to adjudicate against the defendant; but the inquiry into the power of the court to render the judgment, in so far as it affects the garnishee, is, under our system of attachment, limited to the suit that is brought against the garnishee, and can not be raised by the garnishee in the attachment proceedings."

We think the doctrine here laid down is conclusive of the question raised by the motion in the present case.

Again, in the case of *Caldwell Company v. Burton Lumber Company*, 7 N. P., 525, it is said in the syllabus:

"In an attachment case where the defendant is served by publication, and the garnishee answers that he does not owe, it is not necessary that it affirmatively appear that such garnishee has property or money of the defendant; and if such disclosure is not satisfactory, the plaintiff is entitled, upon default, to a judgment for the full amount due, in order that he may subsequently pursue such garnishee under Section 5553, Revised Statutes."

If it is true that the jurisdiction of the court depends upon the fact that the garnishee has property or credits in its hands, or a finding that property actually exists upon which to base a judgment, it is quite apparent that such finding can not be had if the garnishee denies any indebtedness to the defendant or fails to appear and answer. It follows, therefore, if this view is to prevail, that the action against the garnishee would have to be brought and that issue determined before judgment could be rendered against the defendant. A proceeding of this kind, however, would reverse the order of procedure provided by

Section 11851, General Code, as this section clearly indicates that the action against the garnishee must be after or subsequent to the finding and judgment in an attachment suit against the defendant or principal debtor. There can be no escape from this conclusion, for the language of the statute (Section 11851) is explicit, for it says, "If the garnishee fails to appear and answer, or if he appears and answers and his disclosure is not satisfactory to the plaintiff," then in that event "the plaintiff may proceed against him by civil action."

In *Olcott v. Guerinck*, 19 C. C., 32, the court, recognizing the difficulties of reconciling the procedure provided by Section 11830, General Code, and Section 11851, General Code, held that—

"The plaintiff may sue the garnishee before obtaining judgment in the attachment case, and thus have his indebtedness ascertained, but can not have final judgment against him until after the action against the defendant in the attachment is determined."

It seems this would be a circuitous and indirect mode of procedure, as well as an unnecessary and useless expenditure of time and energy.

It has also been held that in an attachment suit against a non-resident defendant, if the garnishee denied the indebtedness, it would be in harmony with the statutes for the court to stay further action in the case until the plaintiff had brought suit against the garnishee, and when the indebtedness of the garnishee was made "to appear by a judgment, to so find and place such finding upon the record, and thus proceed to judgment in the original action" (*Cleveland Co-operative Stove Company v. Frank Mehling*, 21 C. C., 61). But in this case the court was careful to say "but whether this is the only mode the court may pursue may well be doubted. The statute is not so specific as to the mode of procedure as to include the one and to exclude all others."

We are strongly of the opinion that this mode of procedure is not only cumbersome, but in practice it would be wholly unsatisfactory, and, in view of the provisions of Section 11851, General Code, hardly consistent or in strict harmony with the procedure there pointed out.

1915.]

Kirby v. Kerr Turbine Co.

It must be remembered that the finding that the defendant is indebted to the plaintiff before suit is brought against the garnishee for failure to answer or for unsatisfactory disclosure, is really or only a judgment *nisi*, or a conditional finding, and is of no possible validity unless there is in fact property or credits in the hands or in the possession of the garnishee belonging to the defendant at the time the attachment, writ or order was issued; for jurisdiction over a non-resident defendant, in the absence of personal service, is only acquired by the seizure of property or assets, and judgment can be rendered only in an amount equal to the value of the property seized. In garnishment, while there is no manual seizure of property, the effect is the same if the garnishee has property or credits in his possession belonging to the defendant or principal debtor. In the one case it is an attachment by seizure of property; in the other or in garnishment it is a species of attachment by notice. *Beamer v. Winter*, 41 Kans., 596.

In *Vallette v. Kentucky Trust Company Bank*, 2 Handy, 1, it is said that the code "evidently contemplates, that so soon as an action has been commenced, and an order of attachment obtained against a foreign corporation, the plaintiff may at once proceed to make service by publication, and for this purpose his affidavit that there is property or debts to be appropriated to the payment of the claim must be considered as sufficient."

It is further said in this case that—

"A plaintiff who has obtained an order of attachment and made service by publication, can not be postponed in obtaining a judgment, in a case where the attachment has been only served by notices to garnishees, until by their answers or otherwise it shall appear that they, or some of them, are indebted to the defendant."

It is said, however, that this doctrine is contrary to that expressed in *Myers v. Smith*, 29 O. S., 120, which holds:

"If the proceeding is purely *in rem*, and the jurisdiction depends on property of the defendant subject to garnishment being in the hands of the garnishees, the fact that such property exists must be found before the suit in attachment can proceed to final judgment."

If this statement is not merely obiter, it is at best but a mere declaration that no final judgment can be had against the defendant, unless it is actually found that there is property belonging to the defendant in the possession of the garnishee.

In the case of *Alsdorf v. Reed*, 45 O. S., 653, Minshall, J., at page 655 said:

"The legal effect of the garnishment of a debtor of the defendant is, where judgment is rendered for the plaintiff, to transfer the indebtedness of the garnishee to the plaintiff in the attachment so far as the same may be necessary to satisfy his judgment." (Citing *Secor v. Witter*, 39 O. S., 218.)

But it will be noticed that in neither of these cases is it expressly held that after the garnishee has answered and it is found that his answer is unsatisfactory, the plaintiff may not obtain a judgment *nisi* against the defendant.

In *Pennsylvania R. R. Co. v. Peoples*, 31 O. S., 537, it is said in the syllabus, "An attachment will not be discharged on the ground that it appears from the answer of the garnishee that he is not indebted and has no property in his possession belonging to the defendant." And Boynton, J., at page 541, said:

"It was held, in *Myers v. Smith*, 29 Ohio St., 120, that a defendant in attachment can not ask or secure the discharge of the garnishee on the ground that his answer fails to show that he has property in his hands subject to garnishment. The plaintiff is not concluded by the answer of the garnishee. Where his disclosure is not satisfactory to the plaintiff, Section 218 of the code authorizes the latter to proceed against him by action, and to recover a judgment for the amount of the property and credits of every kind of the defendant in the possession of the garnishee and 'for whatever amount he is shown to be indebted to the defendant.'

"It follows, as a necessary consequence, that if the failure upon the part of the garnishee to disclose an indebtedness to the defendant, or the possession of property belonging to the latter, will not authorize the discharge of the garnishee, such failure constitutes no ground to discharge or vacate the attachment."

Nor can it be said that the garnishee may make his defense in the original action; and primarily for the reason that he is not a defendant in that action; and if his defenses to the claim

1915.]

Kirby v. Kerr Turbine Co.

of the principal debtor are of such a character that he is entitled to a jury trial, it is quite evident that he would be deprived of his day in court if the court should undertake to conclude him by any action it might take in the original action against the defendant.

By Section 11853, General Code, it is provided that final judgment against the garnishee shall not be rendered until the action against the defendant in attachment is determined. If the defendant in attachment is personally served and is before the court, the rights of the plaintiff can be readily determined and ascertained. Whether the plaintiff is or is not entitled to the judgment he prays for in the attachment proceeding can be ascertained in the action, and does not depend upon the possession of property by the garnishee belonging to the defendant. If, however, the defendant is a non-resident, and service by publication only is had upon him, the rights of the plaintiff, if any, depend absolutely upon the fact that the garnishee has property of the defendant in his possession, and that fact can be ascertained or determined so as to bind the garnishee only by an action against the garnishee as provided for in Section 11851, General Code. It therefore follows that the conditional finding of the court in the attachment case or the judgment *nisi* is not a final judgment in the sense used in these sections of the General Code, and is only conclusive upon the garnishee for the property or money actually in possession of the garnishee.

The distinction between the case where personal service is obtained in an attachment proceeding on the defendants, and a proceeding where the defendant is a non-resident and service had by publication, must be borne in mind. The doctrine enunciated in *Caldwell v. Lumber Company*, *supra*, is based upon this distinction. It is clear, from Section 11853, that if an action is brought against the garnishee because he fails to answer, or his answer is unsatisfactory, no final judgment can be rendered against him until it is first ascertained and determined that the defendant actually owed the plaintiff upon the claim in his petition. On the other hand, the action against the defendant who is a non-resident, and where the service is by publication, can not proceed to final judgment except as to the amount of property actually found in the possession of the garnishee.

Worthington, Trustee, v. McAlpin. [Vol. 18 (N.S.)]

While these two situations seem inconsistent, yet in reality they are not so, for by a conditional order or a judgment *visi* the court does say, that it finds from the evidence before it that the defendant does owe to the plaintiff a certain amount of money, and it makes the further order, conditionally, of course, that any property found in the hands of the garnishee, and to the extent thereof, shall be subject to the payment of the amount so found due or owing to the plaintiff from the defendant.

For the reasons indicated, the motion will be overruled.

DISPOSITION OF STOCK DIVIDENDS AS BETWEEN LIFE TENANT AND REMAINDERMEN.

Common Pleas Court of Hamilton County.

WILLIAM WORTHINGTON, TRUSTEE UNDER THE WILL OF JOSEPH C. WOODRUFF, DECEASED, v. HARRIETT W. MCALPIN ET AL.

Decided, December 9, 1915.

Trusts—Purpose of a Corporation Paying a Stock Dividend—Determines Whether it shall be Treated as Income or an Addition to the Principal Where the Creator of the Trust Receiving such Dividend is Silent as to Whether it shall Go to the Life Tenant or the Remaindermen.

1. In Ohio there is no hard and fast rule to determine what disposition should be made of stock dividends; that is to say, whether they are payable as income to the life tenant or become part of the corpus of the trust fund and belong to the remaindermen. (*Wilberding, Admr., v. Miller*, 90 O. S., 54, followed.)
2. Where the creator of the trust is silent as to what disposition is to be made of stock dividends, the intention of the company when declaring same in absence of other evidence is the true guide; and where the directors of a company in declaring an extra dividend out of current earnings, payable in stock, expressly state that it is a dividend, it will be so considered by the court and ordered paid to the life tenant.
3. Where the Procter & Gamble Company declared an extra dividend, expressly stating that it was a dividend payable in capital stock of the company, such dividend being declared out of the earnings of the current year, and as the declaration did not have the effect of impairing the integrity of the capital stock of the company, but, on

1915.]

Worthington, Trustee, v. McAlpin.

the contrary, increased its market value, such dividend will be treated as income and directed to be paid to the life tenant.

William Worthington, for plaintiff.

John L. Stettinius, *amicus curiae*.

MAY, J.

William Worthington, as trustee under the will of Joseph C. Woodruff, deceased, filed his petition and supplemental petition, and they are in parts—

That the court would instruct and advise him as to the administration of the trust created by the will of Joseph C. Woodruff, and direct what shall be done with reference to certain shares of the capital stock of the Procter & Gamble Company received by him as trustee as stock dividends paid by said company.

Item IV of the will provides that the rest, residue and remainder of the testator's estate, both real and personal, of whatever nature and wherever situate, be given to the executors hereinafter named, to have and to hold the same in trust, nevertheless, for the following uses and purposes, to pay in certain proportions a net income on the trust estate to certain persons designated during their respective lives.

The petition further recites, that, on and since the first day of April, 1912, the plaintiff, as trustee under the will of Joseph C. Woodruff, has been the owner of one hundred and thirty-three (133) shares of the common capital stock of the Procter & Gamble Company, a corporation organized under the laws of Ohio; that on the first day of April, 1912, the Procter & Gamble Company had a capital stock of fourteen million two hundred and fifty thousand (\$14,250,000) dollars, of which two million two hundred and fifty thousand (\$2,250,000) was represented by preferred stock, divided into shares of the par value of one hundred (\$100) dollars each, and twelve million (\$12,000,000) dollars was common stock, divided into shares likewise of the par value of one hundred (\$100) dollars each; that on the twelfth day of November, 1912, the board of directors of the Procter & Gamble Company adopted resolutions favoring an increase of the common stock of said company in terms as follows:

"RESOLVED, by the Board of Directors of the Procter & Gamble Company that, subject to the action of the stockholders, the capital stock of this company be increased from its present amount of \$14,250,000 to \$26,250,000 in par value, said increase to consist of common stock only in the par value of \$12,000,000, divided into 120,000 shares of the par value of \$100 each, and that said new stock be disposed of at such times, in such amounts and upon such terms and conditions as the board of directors of this company shall from time to time determine."

That in advising the stockholders of the company of the passage of the resolution the company has sent a letter to the stockholders, in which letter it is stated, under the signature of William Cooper Procter, president of the company, that—

"The growth of the business of this company and the favorable prospects for a continuation of this growth in the future are such that your directors feel that there should be an increased distribution of earnings to the holders of the common stock, and the following plan has been approved by the board for carrying it into effect:

"Commencing February 15, 1913, the quarterly rate of dividend on the common stock of the company will be fixed at four (4%) per cent., instead of three (3%) per cent. as heretofore.

"In addition, subject to ratification by the stockholders of the proposed increase in the common capital stock of the company in accordance with the accompanying notice and resolution of the board of directors, the directors expect to declare each year, commencing in 1913, out of current earnings, an extra dividend of four (4%) per cent. upon the common stock. This extra dividend will be payable in common stock in the proportion of one share to twenty-five, to be issued as soon as practicable after the close of each fiscal year, on June 30.

"While it is the hope of your directors that conditions will continue so that no change in any part of this plan may be necessary, it must be understood that its continuance will depend upon the action of the board of directors in each specific instance.

"By order of the board of directors.

"WILLIAM COOPER PROCTER, *President.*"

That in pursuance of the notice and the above letter, the company on the seventeenth day of December, 1912, adopted resolutions providing for the increase of the capital stock from

1915.]

Worthington, Trustee, v. McAlpin.

fourteen million two hundred and fifty thousand (\$14,250,000) dollars to twenty-six million two hundred and fifty thousand (\$26,250,000) dollars, said increase to be divided into one hundred and twenty thousand (120,000) shares of the par value of one hundred (\$100) dollars each of common stock only; that on February 15, 1913, the directors of the company in sending out the quarterly dividend of four (4%) per cent. of the common stock accompanied the same with a letter in which they state:

"In reply to numerous inquiries, we take this opportunity of explaining in detail the terms of the resolution adopted by the board of directors on November 12, 1912. By this resolution the cash dividend rate on the common stock has been increased from twelve per cent. to sixteen per cent. In addition to this, an extra dividend of four per cent. will be declared as soon as practicable after June 30, next, which is the close of the present fiscal year. This dividend will be distributed in new common stock of the company to holders of the common stock in proportion of one share to twenty-five on such date as shall be determined by the board of directors. *This common stock, being a dividend*, will be issued to the stockholders without any cash payment by them. * * *

"This new stock when issued and the scrip when converted into full shares as above, will be entitled to receive the same dividends as the old stock, to-wit, the cash dividend and such extra dividends payable in stock as shall be declared in subsequent years, all in accordance with said resolution of November 12, 1912."

The petition further recites that on the seventeenth day of June, 1913, an extra dividend of four per cent. upon the issued and outstanding common capital stock of the company, payable from the earnings of the past fiscal year, in common stock on or after the fifteenth day of August, 1913, was declared by the board of directors; and on the fifteenth day of August, 1913, this extra dividend of four per cent. was paid by issuing to each holder of common stock certificates of stock for full shares and non-dividend bearing scrip certificates for fractional parts of one share. And at the same time the board of directors sent each stockholder a circular letter with reference to the business of the company and the net earnings for the fiscal year of said company, which ended on June 30, 1913.

In this circular, under date of August 15, 1913, the company says:

"The net earnings for the year after all reserves and charges for depreciation, losses, advertising and special introductory work have been deducted, amounted to \$3,813,111.08.

"The business is growing and the outlook, so far as this company is concerned, is satisfactory."

In the supplemental petition it is stated that during the years 1914-1915 the company continued the policy inaugurated in 1913, and declared each year an extra dividend of four per cent., payable in the capital stock of the company. The circular letter which was sent to all the stockholders contained the same statements as set out in the letter of August 15, 1913, the difference being in the increase, showing a large increase of business.

The question for the court to determine in this case is, whether the extra dividend payable in the capital stock of the company in whole or in part is net income belonging to the beneficiaries under the will, or shall be treated as part of the corpus of the trust estate belonging to the remaindermen, the beneficiaries under the trust being entitled merely to the income upon said stock dividend.

It is agreed by all text-writers, as well as by all courts who have examined this question, viz., whether the life tenant or the remainderman is entitled to a stock dividend, is a perplexing one.

Judge Grant of the Cuyahoga Circuit Court of Appeals recently stated a very salutary principle which should guide all Ohio nisi prius judges, viz., that one case decided by the Ohio Supreme Court is worth one hundred cases decided elsewhere by courts of last resort.

The only case decided by the Supreme Court of Ohio on this perplexing question is the recent case of *Wilberding, Administrator, v. Miller*, 90 O. S., p. 28. The learned and exhaustive opinion in this case was written by Judge Johnson and concurred in by Chief Justice Nichols and Judges Donahue, Newman and Wilkins; Judge Wanamaker dissented, but no dissenting opinion has been printed. At page 47 the court says:

"Whether the life tenant or the remainderman shall be entitled to a stock dividend declared out of earnings accumulated

1915.]

Worthington, Trustee, v. McAlpin.

during any term of years and used by a company in the improvement of its property and business, is a question that has not been determined by this court, nor has the rule that shall be followed as between a life tenant and remaindermen in the distribution of the proceeds of the assets of a corporation on its final distribution.

"The question has been frequently before the courts of England and some of the states of this country. Three principal rules have been considered."

Judge Johnson then makes an exhaustive examination of the present English, Pennsylvania, and Massachusetts rules, citing at length the leading cases in those jurisdictions on this question. The learned judge also examines cases from other states, notably Delaware, New York and Connecticut, and on page 54 lays down what I consider the *ratio decidendi* of the case.

"In spite of the irreconcilable differences in the conclusions arrived at, there are a few general propositions as to which there is substantial agreement. Among them that there should be no arbitrary, rigid rule which would prevent the court from looking into the facts and circumstances of each case to determine the rights of the parties according to justice and equity; that the earnings of a corporation are and remain its property until it distributes them among its stockholders; that when acting in good faith and for the best interests of all concerned, the corporation may reserve the earnings of a prosperous year to make up for a possible lack of profits in future years, or it may retain portions of its earnings and invest them from time to time in the improvement and extension of its plant, and in general betterments, and thus increase the value of its permanent property and assets; that the intention of the testator to be derived from the language employed in the creation of the trust; and from the relation of the parties to each other, and the circumstances of the case, must control.

"It is also a reasonable view that when no special direction is given in the will creating the trust as to what shall be considered principal and what income, the testator will be presumed to have had in mind the legal authority of the corporation to treat its assets as above stated, and to have contemplated that the income would only come from the order of the company itself, acting in good faith."

This extract from the decision in *Wilberding v. Miller*, convinces me that our Supreme Court did not mean to lay down any

"arbitrary, rigid rule" which would prevent the court looking into the facts and circumstances of each case to determine the rights of the parties according to justice and equity.

It would be mere erudition to cite the innumerable cases on this question. They have all been collected by Mr. Stettinius in the admirable and exhaustive brief that he filed as *amicus curiae*.

As said by our Supreme Court in the Wilberding case, there are three general rules: (1) the present English rule under which dividends of cash are held to belong to the life tenant and stock dividends to the remaindermen; (2) the Pennsylvania rule that ordinary dividends on stock held in trust are to belong to the person entitled to the income of the trust fund, but that extraordinary dividends should be apportioned between the life estate and the remaindermen in accordance with the amount thereof accumulated before and after the creation of the trust; dividends of earnings made after death of testator are income no matter whether it be in cash, scrip or stock; and (3) the Massachusetts doctrine, "a simple rule is to regard cash dividends, however large, as income. and stock dividends, however made, as capital."

And in New York a recent ruling of the court of appeals, *In Re Osborne*, 209 N. Y., 450, cited at page 52 in the Wilberding decision, the rule is laid down that in the case of stock dividends there should be an apportionment in such a way as to preserve the integrity of the trust fund, and that surplus earnings before the creation of the trust or purchase of the stock are to be treated as part of the capital of the trust fund.

Therefore, as I am not bound by any hard and fast rule, but am directed under the opinion in the Wilberding case to examine the facts and circumstances of each case, I am of the opinion that justice and equity in this case require me to follow the rule that extra dividends declared out of the earnings of the corporation after the creation of the trust, but payable in stock dividends, belong to the life tenants and not to the remaindermen, provided that the integrity of the trust fund is not thereby impaired. This is the rule that is now followed by the majority of the courts of last resort, and is opposed to the English and Massachusetts doctrine, and that held by the federal courts.

1915.]

Worthington, Trustee, v. McAlpin.

What, then, are the facts in the case at bar? There is no doubt whatsoever that the extra four per cent. dividend payable in the capital stock of the Procter & Gamble Company was payable out of the current earnings of the company, made after the creation of the trust. The trust herein was created in 1904, and in April, 1912, the year before the intention to declare such a dividend, the trustee had one hundred and thirty-three shares of the common stock of the Procter & Gamble Company. And in accordance with the circulars quoted above the intention of the corporation was to declare this extra stock dividend from current earnings. Furthermore, the company itself treated this extra dividend, payable in stock, as a dividend. In its circular of November 12, 1912, this sentence appears: " * * * the directors expect to declare each year, commencing in 1913, out of current earnings, an extra dividend of four per cent. upon the common stock. This extra dividend will be payable in common stock."

It therefore appearing that the stock dividends declared in 1913, 1914 and 1915 were declared out of current earnings, and were treated by the corporation as dividends, what effect did the declaration of these dividends have upon the integrity of the trust fund?

In this connection it was suggested on the argument that the court should follow the rule laid down in Hawaii, *Carter v. Crehore*, 12 Hawaii Reports, 309, viz., that if a distribution of earnings is made in the form of new stock, and the stock is above par, it necessarily follows that the life tenant is entitled only to so much of the stock as equals in value the earnings appropriated, and the rest of it must be held as part of the corpus of the trust.

This, in my opinion, is another form of stating the New York rule as laid down in the Osborne case, *ube supra*, viz., that there must be an apportionment of the fund if the integrity of the trust fund is impaired; and this question requires a consideration of all the facts in the case. In the Hawaii case the capital stock of the company was selling at between five hundred and and five hundred and fifty dollars before the declaration of the increased dividends, and between three hundred and three hundred and fifty dollars after the declaration of dividends, whereas

the Procter & Gamble stock was selling at about five hundred and fifty dollars before the declaration of the dividend, and at this writing is nearly six hundred and fifty dollars. For these reasons I do not think I should follow the Hawaii rule.

I believe that the best discussion of the cases following the rule that I think should be the guide under the facts and circumstances of this case is to be found in *Bryan v. Akin*, 86 Atlantic, 674, and in the *Carter v. Crehore*, 12 Hawaii, 309; *Holbrook, Trustee, v. Holbrook*, 74 New Hampshire, 201. And whoever is interested in this question will find it profitable, not only to read these decisions especially referred to, but the splendid annotations found in 12 L. R. A. (N. S.), 768; 35 L. R. A. (N. S.), 363; 50 L. R. A. (N. S.), 510.

The English and Massachusetts rule and the rule of the United States Supreme Court are hard and fast rules, and should not be applied, as our Supreme Court says, unless the intention of the testator, as expressed in his will, makes it necessary to do so. An examination of the Woodruff will shows that the testator had no express intention on this question, and as Judge Johnson says at page 55 in the Wilberding case:

"It is also a reasonable view that when no special direction is given in the will creating the trust as to what shall be considered principal and what income, the testator will be presumed to have had in mind the legal authority of the corporation to treat its assets as above stated, and to have contemplated that the income would only come from the order of the company itself, acting under good faith."

As has already been shown, the Procter & Gamble Company treated these stock dividends as a payment of extra dividends out of the earnings, payable in the stock in lieu of cash, and in my opinion have instituted this policy so that the cash dividends of this prosperous business should not be too large.

There is another reason why I do not think the same conclusion should be reached as to the disposition to be made of the stock dividends in this case as was made in the Wilberding case. The distributive share of the assets of the corporation were received, in that case, by the trustees on liquidation and dissolution of the company, and naturally they were part of the capital

1915.]

Worthington, Trustee, v. McAlpin.

and belonged to the trust fund, and not to the beneficiary. In the case at bar there is no distribution of the assets of the corporation except earnings.

Then again, on page 59 of the Wilberding opinion it appears that the company in 1905 passed three hundred thousand dollars to the contingent fund, and a little over sixty thousand to the profit and loss account.

The court says:

"There is no reason to show on the statement for this. It was in line with the policy of the company, and as the company had therefore determined to soon cease operations, and did so in a year or so thereafter, these sums should, so far as the portions thereof received by the trustees are concerned, be treated as income."

This likewise confirms me in my view that the Massachusetts rule was not followed by the court.

It was stated at the argument that the United States Commissioner of Revenue, with the approval of the Secretary of the Treasury, had issued a treasury regulation this year in which the former rulings regarding stock dividends as income had been changed, so that hereafter the government would treat them as principal. This was merely a tax regulation, and the treasury officials in order to get a uniformity of rulings followed the United States Supreme Court ruling, which follows the Massachusetts and English doctrine.

Viewing the facts in this case from every angle, it is apparent to me that under the will the testator desired the beneficiaries of the trust to receive the net income of the estate, provided that at no time the corpus or trust funds were diminished, and inasmuch as the extra dividends payable in stock have had the effect rather to increase the value of the fund than to decrease it, and inasmuch as they were declared out of current earnings of the company, I am of the opinion that the questions upon which the trustee asked the instruction and advice of the court should be answered as follows:

1. Should said shares of stock or fractional shares of stock heretofore received, and those which may be hereafter received under similar circumstances be held as part of the principal of

said trust, the income therefrom only to be distributed as directed by the will of said Joseph C. Woodruff in part of said annuities and in part to be accumulated?

Answer. No.

2. Should said shares of stock or fractional shares of stock heretofore received or hereafter received under the same circumstances be regarded as income of the trust and sold, and the net proceeds distributed as income of the year in which they were received as directed by the will of Joseph C. Woodruff?

Answer. Yes.

3. Should part of the value of the shares of stock and fractional shares of stock heretofore received, and others which may hereafter be received under the same circumstances, be considered as income and the residue as principal; and, if so, in what proportion should said division be made, and how shall the plaintiff determine the part thereof which is to be credited to income account and the part thereof which is to be credited to the principal account?

Answer. The answer to the second question makes it unnecessary to answer this question. This question asks for an application of the doctrine of the Hawaii case; but for the reasons given above, viz., that the effect of declaring the stock dividends in the Procter & Gamble Company has been to increase the value of the stock rather than diminish it, it is unnecessary to apply this rule.

In answer to the question raised in the supplemental petition, that in the event the court should find the stock dividends income, what disposition the plaintiff should make of the same under Item VIII of the will, I am of the opinion that the stock dividend of August, 1913, declared prior to the death of Edward Woodruff, which occurred on the 22d day of June, 1914, is payable to his executors.

The stock dividend payable August 15, 1914, to stockholders of record on July 25, 1914, by the provisions of the second clause of Item Four of the Joseph Woodruff will, becomes part of the principal of the trust estate.

In conclusion, it may be interesting to note that the rule followed by the court for the disposition of the question presented

1915.]

Manufacturing Co. v. Casebere.

in plaintiff's petition is followed in Pennsylvania, Iowa, Kentucky, Maryland, New Jersey, New York, South Carolina, Tennessee, Wisconsin, Minnesota and Hawaii. (See Cook on Corporations, 6th Ed., Sec. 554, *et seq.*). A recent Vermont case is to the same effect. *In re Heaton's Estate*, 96 Atlantic, 21.

The court is greatly indebted to Mr. Stettinius as *amicus curiae*, for the exhaustive and comprehensive brief he filed in the case, thus lightening the labor of the court.

A decree in accordance with opinion may be taken.

MEASURE OF DAMAGES UNDER THE SALES ACT FOR BREACH OF AGREEMENT TO TAKE GOODS.

Common Pleas Court of Williams County.

RODERICK LEAN MANUFACTURING CO. v. LEE CASEBERE.

Decided, November 11, 1915.

Sales—Order for Goods Having a Market Value Countermanded—Stipulation as to Liquidated Damages in Case of Breach Held Unenforceable—Measure of Damages Under the Sales Act.

Where a purchaser of goods agrees to pay as liquidated damages 20 per cent. of the purchase price of the goods in case the order which he has placed is countermanded, and the goods covered by the contract of sale have a market value, wholesale and retail, in the marts of trade and the price thereof may be determined with reasonable accuracy, the sum mentioned as liquidated damages will be regarded as a penalty, and the plaintiff remitted to an action for the actual damages sustained by reason of the countermanding of the order.

R. L. Starr, for plaintiff.

C. A. Bowersox and *Lewis G. Christman*, contra.

SCOTT, J.

Demurrer to petition.

The plaintiff brought its action in the justice court of R. H. Lamphere, this township, by filing its bill of particulars therein on March 9, last, and judgment in that court was rendered and entered against the defendant for the amount claimed in the bill. Appeal was taken by defendant from that

judgment to this court. In due time after perfection of the appeal, plaintiff filed its petition herein, alleging therein, in substance, that in July, 1914, defendant was the owner and operator of a hardware store in Jewell, Defiance county, Ohio, and was engaged in selling agricultural implements, and other articles of merchandise; that the store was owned by the defendant; that the son of defendant was in charge of said store, in the general running and management thereof, as representative of defendant; that on July 23, 1914, plaintiff and defendant entered into a written agreement wherein and whereby defendant purchased of plaintiff certain cultivators, plows and disc-harrows, all specifically described in the petition, with the prices agreed to be paid by defendant for said implements, the total sum being \$340.20; that said goods and property were to be delivered on or about January 1, 1915, at Jewell, Ohio, f. o. b. Toledo, each party to pay one-half of the freight, and if cash were paid for said goods, defendant was to have 5 per cent. discount.

The petition avers that the alleged written agreement contains a covenant and stipulation on the part of the defendant that he should not countermand said order except on payment to said plaintiff of 20 per cent. of the invoice prices of said goods as liquidated damages. This stipulation, or provision, is found in the alleged contract, and is in words and figures, following:

"Not to countermand this order, or to have shipment held beyond present season, except on payment to first party of 20 per cent. of the invoice prices of said order as liquidated damages. If shipment of this order is held beyond the time specified in this contract, same may be canceled at option of the first party."

Plaintiff alleges that on October 28, 1914, defendant, in writing countermanded the said order, as follows:

"JEWELL, OHIO, October 28, 1914.

"RODERICK LEAN MFG. CO.

"Dear Sirs: Please cancel my 1915 contract in full No. 105 as I am going to discontinue the implement line. Hoping this will meet your approval,

"I remain, Lee Casebere, Jewell, Ohio."

Plaintiff avers that on December 28, 1914, defendant still insisting on countermanding said order, and refusing to take or receive said goods, if shipped to Jewell, Ohio, plaintiff rendered to defendant a statement of the amount due to it from him for 20 per cent. liquidated damages on account of said countermanding of said order, in the sum of \$63.41, and demanded payment thereof, and that defendant has refused to pay the same, and then follows a prayer for judgment for the amount claimed as liquidated damages.

To the petition of the plaintiff, defendant interposes a demurrer, containing two grounds, as follows:

First. That the petition does not state a cause of action in favor of plaintiff and against defendant.

Second. That said petition does state a cause of action in favor of defendant and against plaintiff.

What purpose the second ground of said demurrer can serve in this case we can not conceive, and it is not considered.

The first ground of the demurrer, in the light of the averments in the petition, raises and presents a difficult and perplexing legal question which we must try to solve in the light of the law as we have diligently and assiduously endeavored to find the law and apply it to the problem presented.

At the very threshold of our labors we are brought face to face with a multitude of conflicts found in the many decisions of our courts, as well as in some of the text-books of law writers. Indeed, it would seem that the conflicts are so countless and varied as to cast us into a shoreless sea of metaphysical jargon, so to speak.

We feel that our labors will have to be confined, largely, to an attempt to count, weigh and determine on which side of this mooted question may be found the "preponderance of conflicts." If the law were an exact science, for instance, like that of war, mighty burdens would dissolve into melting dew, and courts and lawyers might find an asylum of relief in many instances.

However, we fancy that one of the great purposes of the conflict of laws is to give those who play with buzz-saws a vicarious vocation. We have searched in vain for a case anal-

ogous to the instant one. Many cases are found in the law reports of the several states wherein the subject of liquidated damages and penalties is treated, but the vast majority of the cases relate to contracts for the sale of real estate, for delay in completing work, for breach of agreements not to engage in trade at a particular place and agreements not to disclose trade secrets, and those involving the good-will connected with a business, commercial or professional, but no case can be found anywhere that resembles the instant one in the slightest degree.

The legal problem to be unravelled in this case is:

Do the terms and provisions of the alleged contract, whereby the defendant agreed to pay the plaintiff company 20 per cent. of the purchase price of the goods sold, in case he should countermand the alleged order and refuse to accept the goods, constitute a claim and demand for liquidated damages or a penalty?

The plaintiff company forcibly, and with much plausibility, contends that the said provision in said agreement is one for liquidated damages, while defendant, just as forcibly, insists that said provision is one, not for the agreed payment of liquidated damages by defendant to plaintiff, but is a claim as for a penalty, or the actual damages suffered by plaintiff, if any. Both parties to the suit are fortified in their contentions by decisions upon the subject. But not being able to find any decision of any court, tending to elucidate the question here raised, we are left to find our way out of the woods by the use and application of certain well defined and established principles of law, enunciated by courts, treating of kindred subjects touching the construction of contracts.

It is clearly discernible from a study of the cases found in our law reports that no fixed rules can obtain in matters relating to the construction of the provision found in the contract in question, and it is impossible to lay down for the government of any or all cases of this kind any fixed or general rule of law to guide us to a sound and rational solution of the legal problem.

Each case must necessarily, and in a large degree, stand for its proper construction "upon its own bottom."

Certain well defined tests may be employed in determining whether or not the amount of money to be paid, under stipula-

1915.]

Manufacturing Co. v. Casebere.

tions in a contract similar to the one in question, as liquidated damages is in fact such damages or is a penalty.

It follows that if the sum, so stipulated, as and for liquidated damages, is taken as such, it then forms the measure of damages as between the parties to the contract, and upon the trial of the issues as to damages the jury are confined to such stipulated sum in considering and determining the measure and amount of recovery in the action; but, if such sum is held to be a penalty, then it follows that the actual damages sustained, and not the amount named in the contract or agreement, must be taken and considered as the measure of damages.

It is well said that courts are guided in determining this question by the language used in the instrument, the subject-matter of the contract, the intention of the parties to the instrument and the reasonableness or unreasonableness of the sum or amount stipulated.

We find the courts saying that the use of the words, "penalty" and "liquidated damages" in an instrument of the character involved, are not conclusive, although the word "penalty" *prima facie* excludes the idea of liquidated damages.

As to the language of the provision of the contract before us, there can be no question. It is clear, concise and unequivocal in its expression. Neither do we take time to challenge or discuss the reasonableness or unreasonableness of the sum stipulated as liquidated damages. If the sum be, in fact, liquidated damages, then it can not be held to be disproportionate to what might be the actual damage, in case of breach of the contract.

We come now to treat of the subject-matter of the contract in question. The courts seem to be in accord upon one proposition injected into the case, and that is, if the subject-matter of the contract is such that the damages for its breach may be computed with reasonable certainty, by definite rules, then, and in such case, the courts will take the sum stipulated by the parties to the instrument, as a penalty, and not as liquidated damages. But, if from the very nature of the subject-matter of the contract, the damages can not be ascertained with any degree of certainty, as when the subject-matter of the contract has no precise market value, or there are special or peculiar circumstances expressed and contemplated by the par-

ties to the contract, then, in such case, the stipulated sum will be held to be liquidated damages. This criterion seems to be the crucial test employed in arriving at a just, legal and equitable construction of contracts akin to the one in question.

It is true that the rules of law fixing the measure of damages in cases of breach of contracts for the sale of personal property can have no application here, and can not even tend to assist us in arriving at a just conclusion and solution of the main question considered, yet it may not be an extravagant waste of time to advert to the matter.

It is said, and not questioned, that the vendor of personal property, in a suit against the vendee for breach of contract of sale where the property has not passed by delivery, has the choice of any one of at least three methods or remedies to indemnify himself:

First. He may store or keep the property for the purchaser and bring his action to recover the entire purchase price.

Secondly. He may sell the property, acting as the agent of the purchaser, and recover the difference between the contract price and the price obtained on such sale; or,

Third. He may keep the property as his own, and recover the difference between the contract price of the property and the market price at the time and place of delivery.

Certain it is that the plaintiff does not seek to recover in this action its actual damages growing out of a breach of the contract, or a countermand thereof, but stands squarely on its claim and demand for liquidated damages, being the 20 per cent. of the entire purchase price of the goods sold.

Our purpose in reverting to these well established rules of law, fixing and governing the measure of damages in actions for breach of contracts of sale of personal property, is to show that the plaintiff had, and has, a well defined remedy for the alleged breach of the contract in question. No one dare be bold enough to question the right of any citizen of the land to enter into any sort of contract he or she may see fit to become a party to, provided such contract is not founded upon illegal, immoral or fraudulent acts, and is not against public policy. But, we read in the books, that parties are not privileged, under the law,

1915.]

Manufacturing Co. v. Casebere.

to stipulate their damages in any and all contracts. There seems to be a line of demarcation governing and fixing the rights of parties in this regard. Of this fact, the courts are in accord. It is only when the damages that may flow from a breach of a contract are of such uncertain character as that they can not be computed with reasonable exactness and certainty that parties are permitted to stipulate their damages in advance of the breach.

"It is a general rule of construction that the sum agreed upon * * * will be treated as a penalty unless it is payable for any injury of uncertain amount or extent." *State v. Dodd*, 45 N. J. Law, 525.

"If, from the nature of the agreement, it is clear that any attempt to get at the actual damage would be difficult, if not vain, then the courts will incline to give the relief which the parties have agreed on." *Scofield v. Tompkins*, 95 Ill., 190.

In doubtful cases the courts are inclined to construe the stipulated sum as a penalty and not as liquidated damages. *Wallis v. Carpenter*, 13 Allen (Mass.), 19; *Chaddick v. Marsh*, 21 N. J. Law, 463; *Drayton's Appeal*, 61 Pa. St., 175.

It is clear from a reading of the cases upon the subjects presented herein that the language used in the instrument is not controlling. This conclusion is borne out by undisputed authority. It is also held to be true that the amount of stipulated damages must not be disproportionate to the damages that would necessarily flow from a failure to perform. The fact that the parties, or either thereof, to a contract have made a hard bargain can have nothing to do with a decision of the question presented.

The contract or order in question relates to the sale of personal property. In the commercial world there exist certain ancient trade usages, and of these the court may take judicial notice. It may be a violent presumption to assume that a court knows anything, but we will take the hazard of assuming that courts have some knowledge, common to all mankind, and that there are some things that may be judicially noticed, such as the Declaration of Independence, and few such insignificant things that, possibly, exist. Customs and modes of business are things that the courts may take judicial notice of. The

existence of wholesale and retail markets may be judicially noticed.

In some of the states of the Union, the rights and remedies of parties to contracts for the sale of personal property, are regulated by statute. In Ohio we have what is called the "sales act," 99 O. L., 413 (Section 9381 G. C., *et seq.*). While there is no provision in the sales act against parties to contracts, for the sale of goods, stipulating damages, yet we think a reading of certain sections of the act will disclose, clearly, that the legal rights and remedies of parties to such contracts are fixed by this legislative enactment. This act creates a rule of law touching the measure and standard of damages that may be recovered by the seller against the buyer in case of breach of agreement.

Section 8444, General Code, paragraph one, provides that:

"(1) When the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damage for non-acceptance.

"(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

"(3) When there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

Here we have laid down in unmistakable terms by statutory enactment the rights of the parties to a contract of the kind in question.

The question arises now, can parties to such contract avoid the sales act, fixing the measure of damages for breach, and stipulate their damages—damages not sanctioned by this act? Is it not true that when parties in this state enter into a contract relating to the sale of personal property, they adopt and read into such contract, by implication of law, so much of this act as affects their rights, touching the recovery of damages for breach? We are inclined to answer this question in the affirma-

1915.]

Manufacturing Co. v. Casebere.

tive. If our answer be the correct one, then we might stop at this point and go no further.

However, we shall proceed along other lines and try and reach our conclusion upon the main point without resting our decision on the sales act.

Counsel for plaintiff company in his brief, wherein he attempts to demonstrate that the question presented should be solved in favor of his client, says that: The plaintiff company manufacture farm tools. That a great many ingredients enter into the cost of a manufactured article. They are sold at fixed prices, but the cost must be in the nature of a variable amount. The difference between the actual cost and the selling price would constitute the damages. But the cost of raw material, labor, over-head charges, taxes, insurance and many other variable items enter into the cost of any one of the articles sold under the contract. Hence, damages would be very difficult to ascertain. The rule that under such circumstances the parties may lawfully agree on damages, applies, and the amount of damages defendant owes plaintiff is the amount agreed upon.

We are in perfect accord with counsel in this statement found in his brief, but the great disaster that must follow this reasoning of counsel is, that nowhere in the petition herein can it be found, by way of averment, that plaintiff company is a manufacturer of the goods in question. We are not yet permitted to read anything into the petition that is not, in fact, found therein. It goes within repetition that the first ground of the demurrer, being general in its nature, admits averments of the petition which are material and well pleaded.

Courts may take judicial notice of the existence of certain markets in commercial affairs, such as wholesale and retail.

We have markets for grain, horses, mules, cattle, hogs, especially hogs, and markets for all manufactured articles, known to mankind, such articles ranging from a tooth-pick to a Corliss engine. The prices of commodities, goods and wares, in the wholesale markets of commerce, is fixed by the and from the cost of production, which cost includes all things named by counsel for plaintiff, and more not named. The price of articles in the retail markets is fixed upon the basis of a certain per cent. over

the wholesale cost. All these matters are of common knowledge to every person who cares to read as he runs. Prices of all commodities, naturally, fluctuate in the markets of the world, depending, almost exclusively, upon the rule laid down in political economy, that is, supply and demand.

If we were to adopt the argument found in the brief of counsel for plaintiff, that the cost of the production of an article of merchandise depends upon the cost of the raw material, labor, capital invested, taxes, insurance and overhead charges, yet, we believe that the cost of the production of such article could be calculated with reasonable certainty, although the prices of the various ingredients that enter into the manufacture of such article fluctuate in the markets of the country.

The general policy of the law is, in relation to the recovery of damages for breach of contracts for the sale of personal property, to hold the parties to the rule of law that the damages shall be commensurate with the injury sustained.

Such rule is just and humane, and can work no hardship to any one who may come within its purview.

We do not take the time to discuss the question of the intention of the parties to the contract in question, having arrived at our conclusion without reference to the intention of the parties.

We hold that the goods mentioned in the contract and petition herein, are of such nature as that they have a market value, wholesale and retail, in the markets of trade, and having such market value, the prices thereof may be determined with reasonable accuracy, and this being true, it follows that the damages of the plaintiff, sustained, if any, can be computed with reasonable exactness.

Our conclusion is that the sum stipulated by the parties herein, in said contract, as liquidated damages, is not such damages, but is a penalty, and that the plaintiff's measure of damages against the defendant rests upon the actual injury it has sustained by the countermanding of said contract or order.

The plaintiff, standing squarely upon its claim for liquidated damages, and no demand being made in its petition for actual damages, the first ground of the demurrer will be, and the same is, sustained, with exceptions.

1915.]

Packing Co. v. Butchers' Union.

A SECONDARY BOYCOTT NOT PERMISSIBLE.

Common Pleas Court of Hamilton County.

THE H. H. MEYER PACKING COMPANY, ROBERT JACOB AND EMIL
HELFESERIEDER, v. BUTCHERS' UNION LOCAL NO. 232 ET AL.

Decided, February 8, 1916.

Illegal Efforts by Labor Union to Coerce Employer—Conspiracy to Injure Business of Customers of Employer, Having no Relation to the Union, May be Enjoined—No Protection in the Clayton Act for a Secondary Boycott.

1. The recently enacted federal statute, known as the Clayton act, does not withdraw the protection of the law from tradesmen whose business it is sought to ruin by a secondary boycott.
2. A boycott of customers of a wholesale concern, in order thereby to compel said concern to treat with representatives of the labor union in order to preserve its business, is an unlawful interference with the rights of persons with whom the union has no relation, and constitutes a secondary boycott, which is not permissible and may be enjoined.

Nicholas Klein, for the motion.

M. C. Slutes, C. J. McDiarmid and Michael G. Heintz, contra.

NIPPERT, J.

The defendants, through their attorney, filed a motion to dissolve a temporary restraining order heretofore issued prohibiting them from carrying certain banners in front of the premises of Robert Jacob and Emil Helfesrieder, retail butchers, which the plaintiff's claim were designed to injure and destroy their respective business and prevented them from carrying out their contracts with the H. H. Meyer Packing Company, amounting to a conspiracy. One of the banners carried in front of the plaintiffs' stores read as follows:

"This store handles meat of the H. H. Meyer Packing Company, which is unfair to the Butchers' Union."

Another banner read as follows:

"Partridge Brand Meats H. H. Meyer Packing Company is unfair to the Butchers' Union."

Upon the hearing to dissolve the temporary restraining order, the following facts appeared:

The H. H. Meyer Packing Company is an old established firm in the city of Cincinnati, having been engaged in the wholesale meat business for a long time; there was not and is not now any trouble or dissatisfaction among its one hundred and fifty employees on any question pertaining to their wages, working conditions, hours of labor, etc., and the officers of the company, H. H. Meyer and his three sons, have never had any unfriendly controversy with their employees. About a year and a half ago one of the defendants in this case, Michael Schuld, was discharged for reasons good and sufficient to his employers and he soon thereafter organized what is known as the Butchers' Union Local No. 232. After the organization of this Local No. 232, Michael Schuld, who became one of its officers, in company with other officers of the local, called upon the president of the H. H. Meyer Packing Company, for the purpose "of consulting with him concerning the welfare of his workmen," as Mr. Schuld put it on the witness stand. H. H. Meyer, the president of the company, told the representatives of Local No. 232 that if any of *his employees* wanted to see him about their welfare he would be glad to talk to them at any time, but that he did not know Mr. Schuld and did not see why he should permit an outsider, and one not on his pay-roll or in his employ, the right to dictate what he should do regarding his employees; that if the employees had any complaint to make he would hear them at any time. This ended the first interview. Sometime thereafter Local No. 232, through Mr. Schuld, attempted another interview and was refused. Mr. Meyer testified that he does not draw a line in his shop between union and non-union men, and to any one who is willing to work he will give employment if there is an opening; that he pays as good wages as any shop in the city; that the working conditions in his plant are approved, and that

1915.]

Packing Co. v. Butchers' Union.

the hours of labor are the same as in other packing houses; that he has been in business for many years and he has never refused to confer with his workmen and deal with them directly on any question pertaining to their wages, working conditions, hours of labor, etc., and that he did not propose at this time of his life to submit to any outsiders interfering with his business without any apparent cause or reason.

The record does not disclose any evidence showing that there was any dissatisfaction among the company's men or that the company had discriminated between union and non-union men. In fact, as far as the record shows, the relationship of employer and employee appeared to be a very pleasant and satisfactory one at the plaintiff company's plant.

After the refusal on part of plaintiff company's president to enter into any negotiations with Local No. 232 and Michael Schuld, there appeared at the places of the plaintiffs, Jacob and Helfesrieder, the above-mentioned placards or signs, about four feet wide and two and a half feet high.

Emil Helfesrieder, one of the plaintiffs, testified that he was a retail butcher at Findlay Market, had dealt with the H. H. Meyer Packing Company for about twelve years, and that on or about October 7, 1915, one of the defendants, Thomas Rohneeh, placed himself in front of his premises, carrying a banner with this inscription: "This store handles meat of H. H. Meyer Packing Company, unfair to Butchers' Union." He noticed a falling off of his business after a few days and that soon his business decreased from \$15 to \$20 a day. He said that there were many union laborers living in the immediate neighborhood of his shop, whose families had been in the habit of dealing with him, and that heretofore he had sold the Meyer Packing Company goods to the satisfaction of his customers who had become accustomed to this special brand of meats.

Mr. Jacob, who has a retail butcher shop on State avenue, testified that he had been in the retail meat business for about eight months and that he has been a purchaser of H. H. Meyer Packing Company's meats; that a banner similar to the one

carried in front of Helfesrieder's place appeared in front of his place of business on October 7, 1915, and that he noticed an immediate dropping off of his trade. He said he lost all of the street car men's business, which amounted to a profit of about \$10 per day, and that his old customers admitted to him at the time they quit his store that they had done so on account of the banner.

Both of these retail butchers conduct union shops, that is to say, they employ only union men as meat cutters, etc., and testified that they never had any trouble with the union and have abided by their rules in the matter of pay, hours and shop conditions. They testified that Mr. Schuld came to their place of business and took out the union card and threatened to place the aforesaid banner in front of their premises unless they would discontinue purchasing meats from the Meyer Company. This command both Helfesreider and Jacob refused to obey, but continued their trade with the Meyer Packing Company. Helfesrieder said that the Meyer Packing Company had always treated him well, given him credit and had an established reputation in the city for carrying a high grade line of goods.

This court is now called upon, at the instance of the Butchers' Union Local No. 232, Michael Schuld et al, to dissolve the restraining order heretofore granted prohibiting the carrying of these banners and interference with the retail trade of Helfesrieder, Jacob and the Meyer Packing Company.

Counsel for plaintiffs, as well as counsel for defendants, have prepared excellent and voluminous briefs supporting their respective contentions.

Counsel for plaintiffs insist that the defendants have been guilty of a "secondary boycott," and for that reason the injunction ought not be dissolved but ought to be made permanent.

In order to sustain the charge of boycott, it is necessary for the plaintiffs to show that there exists a combination of several persons for the purpose of causing a loss to plaintiffs by causing others against their will to withdraw from these plaintiffs their beneficial business intercourse through threats that, unless a

1915.]

Packing Co. v. Butchers' Union.

compliance with their demands be made, the persons forming the combination (these defendants) will cause loss or injury to him.

Now the petition in this case clearly charges that the defendants have been guilty of boycotting the plaintiff's business by setting out that these defendants have entered into a conspiracy to injure and destroy the business of said plaintiffs, and combined to prevent Jacob and Helfesrieder from continuing their business relations with the packing company by attempting to destroy or injure or curtail the retail business of the aforementioned retail butchers in the manner and form hereinbefore set out.

All of our authorities hold that a combination to injure or destroy the trade, business or occupation of another by threatening or producing injury to the trade, business or occupation of those who have business relations with him is an unlawful conspiracy, regardless of the name by which it is known, and may be restrained by injunction.

Do the facts as set forth in the record of the case at bar justify the conclusion that a secondary boycott exists? That is really the only important question that we are called upon to determine in this cause.

It is not a question here whether a group of individuals have the right to form a labor organization for the protection of the interests of the laboring classes, nor is there a question here pertaining to the open or closed shop proposition, nor are there any questions before this court as to the respective rights of the employees of the Meyer Packing Company, or of the company's relation to said employees. It is merely a question whether or not the defendants shall be permitted to destroy the established business of a small shop-keeper in order thereby to gain its contention, whatever it may be, with the wholesale house. In other words, shall the innocent and industrious union butchers, Jacob and Helfesrieder, and other small retail shopkeepers and tradesmen, be crushed in order that thereby the H. H. Meyer Packing Company may be forced to receive the representatives of Butch-

ers' Union Local No. 232 and Michael Schuld in a conference, which the said packing company does not desire?

The method employed is thoroughly un-American and contrary to the spirit of our Constitution and Bill of Rights, which grants unto every man a free and unrestricted opportunity to enter into the limitless field of lawful trade and business, which has made this country of ours the haven of those from other shores where similar opportunities to live and let live are not presented in the same degree as here.

The case at bar is aggravated, as distinguished from an ordinary boycott, by the fact that it is a *secondary* boycott, and our courts have invariably contended that in all fairness and justice to society such combination and conspiracy known as secondary boycott is not permissible.

In one of the leading cases, decided by Judge Taft in 1889, while sitting in general term of the Superior Court of Cincinnati, being the case of *Moore & Company v. Bricklayers' Union No. 1 et al*, reported in 23 W. L. B., 48, the principle above enunciated is upheld. The law as laid down in the third syllabus of said case is the law today, to-wit:

"A combination by a trade union and others to coerce an employer to conduct his business with reference to apprentices and the employment of delinquent members of the union, according to the demand of the union, by injuring his business through notices sent to his customers and material-men, stating that any dealings with him will be followed by similar measures against such customers and material-men, is an unlawful conspiracy."

A combination between persons or parties merely to regulate their own conduct and affairs is permissible and such is a lawful combination even though others may be indirectly affected thereby. But a combination to do an injurious act, expressly directed against another by way of intimidation or constraint either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition and therefore unlawful, and the wrongful interference with one's business and prospective customers is as much an infringement of the tradesman's

1915.]

Packing Co. v. Butchers' Union.

rights as though contractual relations actually existed and were interfered with.

Thus the occupation and trade of the plaintiffs, Jacob and Helfesrieder, by means of which they earned a livelihood and endeavored to better their respective conditions and to provide for and support themselves and their respective families, is property within the meaning of the law, and is entitled to protection as such.

Labor may organize the same as capital for its own protection and to further the interests of the laboring classes. They may strike and persuade and induce others to join, but when they resort to unlawful means and cause injury to others with whom they have no relation, the limit provided by law is passed and they may be constrained. In support of this principle of law we refer to the opinion of the Supreme Court of the state of Missouri, in *Lohse Patent Door Co. v. Fuelle*, 215 Mo. Rep., 421; *Hopkins v. Oxley Stave Co.*, 83 Fed., 912; *Gray v. Building Trades Council*, 91 Minn. Sup. Ct. Rep., 171; *Sherry et al v. Perkins et al*, 147 Mass., 212; *Toledo Railway Co. v. Pa. Co.*, 54 Fed., 730; *Pope Motor Car Co. v. Keegan*, 150 Fed., 148; *Hutting Sash & Door Co. v. Fuelle*, 143 Fed., 363; *O'Brien v. People*, 216 Ill., 354; and the leading case, decided May 5, 1911, by the United States Supreme Court, reported in Vol. 221 U. S., 418; *Gompers v. Buck Stove & Range Company*, to which reference is made by the court in support of refusing to grant defendant's motion to dissolve the temporary restraining order heretofore issued.

Most of the above cases were cited by Mr. Nicholas Klein, attorney for the defendants in this action, and have met with approval in the brief submitted by counsel for plaintiffs. So that, on the proposition of secondary boycott there can be no question as to the law and correctness of the court's conclusion herein.

It is contended by counsel for defendants that the Clayton act, recently passed by Congress, wipes out all the past decisions of our courts, both state and federal, pertaining to labor controversies. But we can not agree with learned counsel's con-

tention, for the reason that the Clayton act does not withdraw the law's protection from a tradesman whose business is attempted to be ruined by means of a secondary boycott, as is the fact in the case at bar.

As to the other questions involved, that is, whether or not the summons issued to the defendant, Butchers' Union Local No. 232, should be quashed, it may be stated that the said union appears of record in this case as one of the answering defendants, and admitted that Michael Schuld is its business representative and that Nicholas Klein is its attorney, and the record showed that the matter of secondary boycott was made the subject of discussion and resolution at the meeting of the defendant union, and that the boycott was a result of the concerted action of the union as testified to by its officers and business representative in open court.

Judge Morrow, of the United Circuit Court, held as follows, in the case reported in 85 Fed., 252, *Government v. California Coal Barons*, who had formed a combination in restraint of trade, in violation of the act of Congress, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies":

"In a suit in equity to restrain an alleged unlawful combination acting as an unincorporated association, it is sufficient that the association, together with a number of its members as individuals and officers are made parties defendant."

This sound and wholesome interpretation of the law successfully destroyed a coal monopoly on the Pacific Coast, which threatened the well-being of small users of coal. Judge Morrow, by this holding, broke the stranglehold which the coal monopolists had upon the business of the retailers and upon the small consumers, and the application of Judge Morrow's ruling in that case is justified in the case at bar, where the plaintiffs have made the unincorporated local union and its executive officer, Michael Schuld, parties to this action. The union has thus had its day in court and was in court in the person of its organizers, busi-

1915.]

Parker v. Village of Dover.

ness representative and officer, Michael Schuld, and its attorney, Nicholas Klein.

In view of the above, the motion to dissolve the temporary restraining order and the motion to quash the summons will be overruled and the injunction will be made permanent.

**PROSECUTION OF OWNER OF AUTOMOBILE FOR
EXCEEDING SPEED LIMIT.**

Court of Common Pleas of Cuyahoga County.

R. W. PARKER v. VILLAGE OF DOVER.

Decided, February 24, 1916.

Criminal Law—Inadequate Proof of Exceeding Speed Limit with Automobile—Responsibility of Defendant Owner Not Shown—Failure of Defendant to Take the Stand Does Not Lessen the Proof Required Against Him.

1. The owner of an automobile can not be legally prosecuted and compelled to pay a fine and costs for exceeding the speed limit with his automobile, where the only evidence against him is that his automobile was seen going along a public highway at a speed greater than that allowed by law.
2. The amendment to the Constitution of 1912, relating to the failure of a defendant in a criminal prosecution to take the stand and testify, in no way lessens the proof required before a conviction can be had, nor does it change the well settled rule of procedure that before a defendant can be called upon to produce his defense the state must prove every essential element of the crime charged.

POWELL, J.

Plaintiff in error was arrested and placed on trial in the mayor's court of the village of Dover, Cuyahoga county, Ohio, upon the following affidavit, to-wit:

"Before me, mayor of the village of Dover, in Cuyahoga county, personally came Fred Smith, deputy marshal, who being

duly sworn according to law, deposes and says that on or about the 19th day of September, A. D. 1915, at said village and county, one Dr. R. W. Parker, being then and there in charge of and operating a certain motor vehicle, to-wit, an automobile, did unlawfully, wilfully and purposely operate said vehicle on Bradley road, in the said village and county, at a rate of speed greater than fifteen miles per hour, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Ohio, and further deponent says not.

“(Signed) FRED SMITH.

“Sworn to and subscribed before me, this 25th day of September, A. D. 1915.

“(Signed) AUG. C. FORTLAGE, *Mayor*.”

To this affidavit plaintiff in error filed a motion to quash, which being overruled, a demurrer was filed. After the overruling of the demurrer, plaintiff in error entered a plea of not guilty.

Upon the trial, numerous objections were interposed by able counsel for plaintiff in error, and at the close of the testimony a motion was made to dismiss the case and discharge plaintiff in error, upon the ground that the village had failed to sustain the allegations in the affidavit.

This motion the trial court overruled, and imposed a fine of ten dollars. A motion for a new trial was duly filed and refused. Proper exceptions were taken throughout the case.

The case comes into this court upon a petition in error to reverse the judgment of the mayor's court and to discharge plaintiff in error.

The most important question presented by this record which will first be considered is, can an owner of an automobile be arrested, convicted and mulcted by fine and costs solely upon proof that his automobile was seen going along a public highway at a rate of speed greater than that permitted by law?

This question becomes important because the automobile, which a few years ago was a luxury to be enjoyed by the wealthy only, is now a necessity, and has become so common that a person of ordinary means may own one. The common use of auto-

1915.]

Parker v. Village of Dover.

mobiles for pleasure has given birth to an industry by which certain not over-scrupulous justices and special constables have materially increased their incomes without great labor on their part. Recognizing the fact that the average citizen is not familiar with court procedure, and so abhorrent to arrest and trial that he would pay from ten to fifteen dollars rather than go through the ordeal, these speed merchants would station one of their minions under a shady tree along a much-traveled highway on Sunday afternoon, who would take the license number of every prosperous-looking driver, regardless of the speed of the machine. A few days later the owner would receive a notice to appear before some justice in a remote part of the county to answer to the charge of violating the speed law. He was usually advised that if he would plead guilty he would be assessed a nominal fine and costs. The owner, having no knowledge of any speed violation on his part, thought it would be the part of economy to comply with this most kind and brotherly offer of the justice, and usually paid.

To protect the ordinary owner in event he should be so unfortunate as to fall into the trap of these most kind and considerate speed merchants, as well as to instruct the honest official who is conscientiously endeavoring to perform his duty, is the purpose of attempting to point out in this decision what evidence is necessary to convict in this class of cases.

In justice to those concerned, I should say in passing that in my opinion all persons connected with the prosecution of the case at bar were honestly endeavoring to perform their duty in suppressing speed violation. There is a class of reckless drivers who take advantage of every opportunity to violate the speed law. They have no regard for the rights of others, and seemingly none for their own safety. These offenders should be dealt with severely. The officer who captures and convicts this class of drivers is entitled to the highest commendation; but even these drivers should not be convicted without due process of law. Surely the driver of an automobile is entitled to as much consideration as a murderer or a highway robber. Sup-

pose you are assaulted some dark night at an unfrequented place, you are knocked down and rendered unconscious, your money and other valuables are taken from you. The police arrest some crook who they suspect committed the crime. He is indicted and placed upon trial. The law surrounds him with every safeguard; he is presumed to be innocent until proven guilty; every essential element of the crime of robbery must be proven beyond a reasonable doubt before he can be convicted. Is it such a heinous crime for a man to take his family out for a ride that he thereby forfeits his right to be treated equally as well as a highway robber?

The affidavit in this case is based upon Section 12604 of the General Code of Ohio, which, so far as it applies to this case, provides as follows:

“Whoever operates a motor vehicle at a greater speed than fifteen miles per hour shall be fined not more than \$25.”

Before a conviction could be had in this case, it was necessary for the village to prove beyond a reasonable doubt the two essential elements of the offense charged, namely:

1. That the law had been violated, *corpus delicti*; that is, that a motor vehicle had been operated at a greater rate of speed than fifteen miles per hour.
2. That the plaintiff in error is the person who violated the law; that is, that he is the person who operated this motor vehicle on the day in question at a rate of speed greater than fifteen miles per hour.

The *corpus delicti* is established by the testimony of the deputy marshal. But another step is necessary to produce a conviction, and that is the identity of the person charged. The evidence as to the identity of the person operating this motor vehicle on September 19, 1915, is wholly circumstantial, and is based solely upon the testimony of Fred Smith, deputy marshal of the village of Dover. He testified, in brief, that he was out catching speeders on the afternoon of September 19th, 1915, and that he observed a machine on Bradley road which he

1915.]

Parker v. Village of Dover.

thought was exceeding the speed limit. He confirmed his suspicions by giving chase for a distance of about one-half mile on his motorcycle, which registered a speed of thirty-two miles per hour. He said he made a note of the number, which was 47311. What he next did is shown by the record on page 11:

“Q. When did you first learn that the car that you followed for half a mile and which carried the license number you mentioned, belonged to Dr. Parker? A. I found out that evening.

“Q. How did you ascertain that fact? A. The mayor here has a book with the numbers in.”

This is the only testimony in the case showing the ownership of the automobile in question. The book was not introduced in evidence. Upon these facts he swore to the affidavit and caused the arrest of plaintiff in error.

It appears from the record that this officer acted upon the theory that this law reads as follows: “*Whoever, being the owner of a car that is observed exceeding the speed limit shall be guilty of an offense,*” because he made no effort to learn either the name or identity of the person operating this car. There is not a word of testimony in this case showing or tending to show that Dr. Parker was operating this car, or that he was in the car at the time, or that he was in the village of Dover on that day.

The following quotations from the record is all of the testimony relative to the identity of the person operating this automobile (reading from page 14):

“Q. Who was driving the car? A. I couldn’t tell you that. I couldn’t see from the rear who was driving, because I don’t know whether it’s a left-hand drive or a right-hand drive.

“Q. And you don’t know who was driving the car? A. No, I don’t.”

Again at page 15:

“Q. But you don’t know who was driving that car, as a matter of fact? A. If it was a right-hand drive—

"Q. I am not asking you that. A. Well, I don't know.

"Q. Did you know Dr. Parker on the 19th of September?

A. No, sir.

"Q. Did you see him in the village of Dover on the 19th of September? A. I saw his machine. I don't know whether I saw him or not."

The only circumstance disclosed by the record is that an automobile presumably owned by Dr. Parker was observed by the officer traveling along Bradley road at a rate of speed exceeding fifteen miles per hour. The proof as to ownership was meager and improperly received.

Now, as to identity. Section 184, page 122, *Harris on Identification*, is as follows:

"The identity of persons or things is a fact, to be proved like other facts before a jury, and may be proved by any of the various means known to the law of evidence, whether in a general or special way, and whether by expert testimony, by comparison, or by circumstantial evidence; and often where the more rigid rules of the law of evidence are relaxed, more flexible, more liberal, when the issue presents a question of disputed or doubtful identity. These cases, indeed, often form an exception to the general and well-recognized rules of evidence. The necessity for a relaxation of these rules grows out of the extreme difficulty which arises in making the proof, and especially is this true in criminal practice; take, for instance, a case of homicide; *the first step, of course, is to prove the corpus delicti and the venue; the next, and no less important, step is the identity of both the deceased and the accused; and unless the identification is clear and beyond a reasonable doubt, the prosecution must fail.* And this often presents difficult, serious and grave consideration. And the numerous reported cases of mistaken identity admonish the courts and juries to weigh circumstances tending to establish identity, with abundant caution. For mere circumstances to be vested with the force of truth or conclusiveness, they must exclude every other hypothesis, and generate full belief. It is then, and only then, that they inspire full confidence."

Now, as to circumstantial evidence, as it applies to criminal cases. Circumstantial evidence is the proof of facts which stand

1915.]

Parker v. Village of Dover.

in such relation to the ultimate fact to be proved that such ultimate fact may be inferred from the fact proven. Each and every fact from which the existence of the ultimate fact to be proven is sought to be inferred, must be proven beyond a reasonable doubt, and the conclusion or inference of guilt should flow naturally from the facts proven. Mere opportunity to commit crime is not alone sufficient to prove that crime was committed. If the facts proven can be fairly and reasonably harmonized with the innocence of the defendant, they should be so reconciled.

In *Smith, Administrator, v. Curtiss*, 10 C.C.(N.S.), 149, a civil action to recover damages for negligence, the chain of circumstances shown by the evidence was more complete and convincing than in the case at bar. The trial court in that case directed a verdict at the conclusion of plaintiff's testimony. The circuit court, in affirming this judgment, said:

"The rule which permits the proving of the case by circumstantial evidence requires that the evidence shall be such that the court or jury can reason from established facts to well defined conclusions, and is not applicable if the conclusions are based in any degree on conjecture or speculation."

We must not overlook the fact that in civil cases the degree of proof is only by the preponderance of the evidence, while in criminal cases it must be beyond a reasonable doubt.

In another civil case, *Andrews v. L. S. & M. S. Ry. Co.*, 58 O. S., 426 (same case 64 O. S., 614), in what appeared to be a pretty conclusive case of circumstantial evidence, the Supreme Court held the evidence was not sufficient to go to the jury, and that a verdict for defendant should have been directed.

The charge in this affidavit that plaintiff in error was operating a motor vehicle at a rate of speed greater than fifteen miles per hour is not supported by any evidence whatsoever. The circumstance of ownership, if we should grant that that was properly shown, falls far short of proving that plaintiff in error was operating this car on said day, and plaintiff in error should have been discharged.

At the conclusion of the testimony on behalf of the prosecution in this case, the defendant did not take the stand to testify on his own behalf, and produced no other testimony in his defense, but relied upon his plea of not guilty. Counsel for the village contends that under our Constitution as amended in 1912, the fact that defendant did not take the stand to testify may be used against him. The provision of the Constitution to which counsel for the village refers will be found in Section 10 of Article I of the Constitution as amended on September 3, 1912, and is as follows:

"No person shall be compelled in any criminal case to be a witness against himself, but his failure to testify may be considered by the court and jury, and may be made the subject of comment by counsel."

This provision of the Constitution was not intended to and does not lessen the proof required on behalf of the prosecution before a conviction can be had in a criminal case, nor does it change the well settled rule of procedure that, before the defendant can be called upon to produce his defense, the state must prove every essential element of the crime charged. To hold otherwise would be doing violence to that part of the Constitution which says that no person shall be compelled in any criminal case to be a witness against himself. This provision of the Constitution was intended to apply when the state has shown by its evidence certain facts or chain of circumstances to exist, which, unexplained, are such as to overcome the presumption of innocence, and in such case, if the defendant should not take the stand to explain, it would be proper for the court and jury to take into consideration the fact that the one person who could explain had not done so. This provision of the Constitution does not aid the prosecution in this case.

The judgment of the lower court is reversed, and plaintiff in error discharged.

1915.]

Wallis v. Moore.

HEAVY DAMAGES FOR INJURIES RECEIVED IN A COLLISION OF AUTOMOBILES.

Common Pleas Court of Cuyahoga County.

WILLIAM R. WALLIS v. EDWARD W. MOORE.

Decided, March 24, 1916.

Negligence—Automobile Emerging from Side Street—Struck by a Rapidly Moving Machine on the Main Boulevard—Owner of the Car Which Was Struck Severely Injured and Heavy Damages Awarded—Rule of "Stop, Look and Listen" Not Applicable—Where Car Emerges from a Side Street Upon a Main Thoroughfare—Sanction of a Verdict on Third Trial—Competence of Evidence—Assumption by Counsel of Judicial Prerogative in Advising Witness.

The law imposing upon one about to drive over a steam railroad crossing the duty to stop, look and listen, and the requirements as to care to be exercised by a traveler at a steam railroad crossing, as laid down in the case of *Railway Company v. Elliott*, 28 O. S., 340, do not apply, in the operation of automobiles upon our public highways, so as to require one driving an automobile upon a side street and intending to enter upon a main street to exercise such degree of care and circumspection, as a matter of law, with reference to automobiles which may be driven upon the main street.

*Thompson, Hine & Flory and Harry F. Payer, for plaintiff.
Tolles, Hogsett, Ginn & Morley, Seaton & Paine and Mathews, Orgill & Maschke, contra.*

STEVENS, J.

This motion follows the third trial of this case. On the first and third trials verdicts were returned for the plaintiff, and on the second trial the jury disagreed. Each of the trials has taken approximately two weeks of the time of the court and jury.

While authority is available for the proposition that a second or third verdict for the same party adds special sanction to the conclusion of a jury, yet it would seem, upon principle, that error is none the less error because perchance it intervenes at a third trial. It is with this principle in mind that I have addressed myself to a consideration of this case.

The following are grounds upon which defendant predicates his claim of right to a new trial:

It is claimed that the plaintiff's own testimony raises, as a matter of law, a presumption of contributory negligence, and that no testimony was offered to rebut that presumption; that the verdict was against the weight of the evidence; that the verdict is excessive and appears to have been rendered under the influence of passion and prejudice; that as to the exclusion of one item of evidence, there was error in the ruling of the court; that there was misconduct on the part of counsel for plaintiff, and that there is now available newly-discovered evidence.

All of the statutory grounds for new trial are set forth in the motion, but the above are the only ones relied upon in brief and argument.

I take up first the claimed error in the exclusion of testimony offered by defendant.

Defendant called as a witness Dr. W. E. Bruner, who testified that he had examined the eyes of the plaintiff on a day within the period of the present trial, and also in February of last year. He testified as to the condition of plaintiff's eyes at these times. He was then asked if he had examined W. R. Wallis' eyes before a year ago, and he answered, "I have examined a W. R. Wallis. Whether it was this same W. R. Wallis or not, I can not say. * * * These examinations were in 1902 and in 1907. * * * He was referred to me in the first examination by Mr. Harley Gibbs, and on the second examination by W. J. Davey." (It appears elsewhere in the record that Mr. Wallis and Mr. Gibbs had been friends, and that Mr. Davey was a clerk in the Hollenden Hotel, where Mr. Wallis was accustomed to stay when in Cleveland.)

Dr. Bruner was then asked by counsel for defendant if he was able to remember that plaintiff is the same W. R. Wallis that he examined on those two occasions, and he answered: "I do not remember that; I have no recollection of him, none whatever. I wouldn't have known it except that I found in the card index to my books the name W. R. Wallis and two other cards made out in the same name."

1915.]

Wallis v. Moore.

Upon the basis of this preliminary testimony, the witness was asked the following question:

“Now, I will ask you, what did you find the difficulty with Mr. W. R. Wallis’ eyes on the first occasion of your examination and on the second occasion?”

An objection to this question was sustained, and upon this ruling by the court error is predicated.

I am unable to conceive any theory as to the evidential proprieties which would permit an answer to that question. There was a total failure and disclaimer of identification. The recollection of the witness was not in the faintest degree refreshed. The question did not propose an offer of the doctor’s office index or record. Even had it done so, the matters sought to be elicited were not the recognized subjects of book account; and if the records were offered simply as records of past recollection, there was entire failure to lay foundation for such offer.

I do not feel that we need go exhaustively into a discussion of the propriety of this ruling. I will simply add that a careful search of the authorities on the subject of evidence has failed to reveal any principle or precedent which would justify the court in permitting the question to be answered.

The ground of newly-discovered evidence is urged. Waiving the criticism of failure to show that the matters set forth in the affidavits could not with reasonable diligence have been ascertained in time for use at the trial, an examination of these affidavits makes it manifest that their subject-matter is purely cumulative, and also of very limited range. No rule is more firmly established in our state than that newly-discovered evidence which is merely cumulative is not ground for a new trial. *Railway Company v. Long*, 24 O. S., 133; *Karlinger v. Brewing Co.*, Case No. 880 in our court of appeals, and cases cited in the court’s opinion.

There is the further infirmity in the subject-matter of these affidavits, viz., that if the evidence offered at the trial, and upon which the verdict of the jury was presumably based, supported the verdict of the jury, this proffered newly-discovered evidence most certainly could not be said to require a different verdict.

This is vital. See *Railroad Company v. Long*, *supra*; *Traction Co. v. Fesler*, 12 C.C.(N.S.), 565; *Fritch v. Traction Co.*, 14 C.C.(N.S.), 79, affirmed without opinion, 88 O. S., 525.

On the matter of alleged misconduct of counsel, I will here confine my attention to a few instances which counsel for defendant regard as typical, and which are set out in the brief of counsel because doubtless they were regarded as the more flagrant instances of misconduct.

It is complained of counsel for plaintiff that he propounded questions which were leading, and that upon objection being sustained he questioned the witness with reference to the facts suggested by the leading question.

I have been at considerable pains, in reading the record of testimony in this case, to have this criticism in mind. I do not recall an instance in which the leading or suggestive question was directed toward any matter which was crucial or vital in the case. Indeed, I doubt whether error could have been properly claimed if the court, instead of sustaining the objection, had overruled it. Leading questions upon non-vital matters, or such as are preliminary, or by way of inducement, are not improper, and their allowance is within the discretion of the court. None of the questions objected to were of a character so doubtful as those considered by our Supreme Court in the case of *Evans v. State*, 24 O. S., 458 at 462. But the court, perhaps from a superabundance of caution, invariably sustained objections to such questions. If it be the law that an objection to a leading question having been sustained, that subject may not thereafter be inquired into without the intervening of error, it is safe to conclude that not one jury trial in a hundred would endure the test.

At page 51 of the brief of counsel for defendant, counsel for plaintiff is charged with misconduct in interrupting the cross-examination of one of plaintiff's witnesses by saying "the point is" and "watch his questions, Doctor." Mr. Hogsett was cross-examining the witness:

Question: "Did he (Mr. Wallis) tell you where the accident happened?"

Answer: "Well, I understood it was somewhere along on the boulevard. I don't know the exact location."

1915.]

Wallis v. Moore.

Here occurred the interruption by Mr. Payer. His remarks lacked completion as sentences, because they were broken into by objection by Mr. Hogsett and by the admonition of the court that there was no occasion for interruption. Mr. Payer's remarks, thus dissevered, were:

"The point is, Doctor * * * but he is answering one thing and * * * watch his questions, Doctor."

Such prejudice, if any, as might arise from this incident could come only from Mr. Payer's attempted assumption of the judicial prerogative of advising the witness that his answer was not responsive.

The only way in which a sound judgment can be reached as to the character and possible effect of these alleged matters of misconduct is by considering not only their text, but also their context. Any other method of considering them—any judgment pronounced upon them without considering the incidents which called them forth, or in many instances the colloquy with opposing counsel in which the remarks criticized were a part, would not be doing justice to the facts of the trial.

The trial, lasting as it did for two weeks, was, on the whole, conducted with decorum and with strict observance both of the spirit and of the letter of the law as to the introduction of evidence and the examination of witnesses. Objections to questions which had the slightest suggestive character were made and were sustained. The court frequently throughout the trial, and at all times when so requested by counsel for defendant, instructed the jury to disregard answers which had been ruled out, and to draw no inferences whatever from questions objection to which had been sustained.

I am firmly of the opinion that as to the claim of misconduct on the part of counsel or of witnesses for the prevailing party, no error has intervened to the prejudice of the rights of defendant.

Coming now to the question of negligence, it is urged that the testimony offered in behalf of plaintiff, and especially that of his chauffeur, Alex Herder, raises, as a matter of law, a presumption of contributory negligence, and that no evidence was offered to rebut that presumption. If that claim be not well

based, it is still urged that the verdict of the jury on the question of negligence was against the weight of the evidence. My conclusions upon these two claims, and my reasons for such conclusions, will be indicated in the one discussion of the whole matter of negligence which follows.

I have had some doubt of my right, under Section 11577 of the General Code, to consider the weight of the evidence. At the first trial of this case the jury returned a verdict for plaintiff. In defendant's motion for a new trial, filed at that time, a number of grounds were specified, and among them was the claim that the verdict was against the weight of the evidence. The journal and the court's trial calendar simply showed: "Motion for new trial granted." No ground was specified in journal or trial calendar. A stenographic report of the opinion of the trial judge at the time of granting the motion for a new trial shows that he used this language:

"Now the situation that results from that is simply this: Here is a record, to my mind, which does not disclose any error, unless it be that the verdict is against the weight of the testimony."

Although the facts surrounding the granting of the motion at a former trial are thus presented, I have decided to treat this case as though the matter of weight of evidence were still open to my consideration. It may be the law—I have not investigated the subject—that the known fact as to reason for granting the motion must be ignored when the reason has not been entered upon the journal of the court.

There is very little disagreement between plaintiff's and defendant's witnesses as to how the accident happened and as to the circumstances immediately preceding and accompanying its happening. The collision occurred in the day time on the main boulevard running east and west in Gordon Park, its easterly extension running toward Bratenahl, its westerly end crossing over Doan brook and thence to the boulevard running to the lake. It occurred just east of the bridge which crosses Doan brook. A small boulevard or roadway runs from the lake east of the brook and enters upon the main boulevard east of the bridge. At the corner to the left hand of one coming southerly

1915.]

Wallis v. Moore.

on the small roadway toward the main boulevard was a clump of shrubbery concealing the view easterly on the main boulevard. The main boulevard is thirty feet wide from curb line to curb line, but wider where the small road enters it. The layout of the roads, so far as all essentials are concerned, is analogous to the situation, say, at Euclid avenue and East 79th street, having in mind the buildings at the northeast corner of East 79th street. One driving south on East 79th street toward Euclid avenue, and one driving down town on Euclid avenue and approaching East 79th street, would be in the same situation relatively as were Wallis and Moore at the time in question, with the exception that from the corner of East 79th street one can see farther east than he could from the corner of the small road in Gordon Park. Wallis' automobile emerged from the small road going slowly, some witnesses say very slowly. Witnesses for both plaintiff and defendant agree upon that. The driver was intending to make a left-hand turn and go eastwardly toward Bratenahl. His car slowly crossed the road. Its hind wheels were over or beyond the center of the road and its front wheels were within two or three feet of the south curb when it was struck by the Moore car on the south side of the road, that is, on the left side of the road with reference to Moore's car. Witnesses for both plaintiff and defendant are agreed as to all that. The surface of the road was macadam, and it was dry and somewhat down grade. Officer Zuerl, produced as a witness by defendant, examined the cars and surroundings shortly after the accident. He testified, in response to a question by defendant's counsel, that the roadway showed that the Moore car had slid or skidded for some twenty-five or thirty feet before striking the Wallis car. As to all of these physical or mechanical facts which I have recited, all witnesses agree, or they were testified to by defendant's witnesses.

The testimony is conflicting as to the distance eastwardly which a car on the main drive could be seen by one emerging from the small drive, the testimony on this subject giving estimates varying from 150 feet to 400 feet and as high as 520 feet. The length of view is varied to some extent according to the precise position of the observer after emerging from the small drive. A consideration of the maps and photographs, and of

the oral testimony is quite persuasive to the effect that the estimates of greater distance of view were the more accurate. Testimony also conflicts to some extent as to the speed at which the Moore car was being driven at the time. Plaintiff's witnesses place it at thirty-five or more miles per hour. Robertson, driver for Moore, is of opinion that he was driving "about fifteen miles" per hour, but concedes that it might have been slightly more than that. Testimony was given as to the distance within which a car going at various speeds may be stopped. The testimony of Traffic Officer Zuerl, that the wheels of the Moore car slid for twenty-five or thirty feet, has relevancy on the matter of speed.

Testimony also conflicts as to the position of the Moore car in the road when first seen, some witnesses saying it was in the center, and witnesses for the defendant saying that it was on the right side of the road.

Plaintiff's witnesses testify that the Moore car was 150 or 200 feet distant when they first saw it, and that the Wallis car was then at the center of the main road. Moore's driver, Robertson, says that when he first saw the Wallis car he was about forty feet distant from it, was on the right side of the road, and that the Wallis car was just coming out from behind the bushes.

It is contended by counsel for defendant that the testimony given on behalf of plaintiff, and especially that given by Alex Herder, driver for Wallis, brings this case squarely within the doctrine of *Railway Co. v. Elliott*, 28 O. S., 340. This doctrine being deemed by counsel to have application, it is urged that the undisputed testimony shows that if Herder had looked he could have seen, and that he can not be heard to say that he could not see what could be seen "by one in the full possession of his faculties," exercising them with ordinary care.

To apply the doctrine of the Elliott case to the operation of automobiles upon our highways would necessitate a holding that one driving from a side street into a main highway subjects himself to the rigorous requirements as to care which are imposed upon one who drives across the right-of-way of a steam railroad. He must stop, look and listen. If he desires to cross the main highway he can not be permitted to assume that an approaching automobile will slow down to permit him to cross if he is first

1915.]

Wallis v. Moore.

to arrive at the crossing, or that it will operate at the speed prescribed by law. This is undoubtedly not the law governing one about to drive a horse and wagon across a street railway track. If this case were one between the driver of a horse and wagon and a street railway company, and all the testimony and circumstances were presented as they are here presented, there could be no serious debate upon the proposition that the case was one for the jury. The case of *Traction Company v. Brandon*, 87 O. S., 187, definitely establishes that proposition. In the opinion in that case Judge Spear, in considering the obligation to look and listen at steam railroad crossings, says:

“Nor would a failure be regarded as negligence if under all the circumstances a person of ordinary prudence would be justified in omitting to use them (his faculties), the question of negligence and contributory negligence being a mixed question of law and fact to be decided by the jury, unless the circumstances of the case admit of no rational inference but that of negligence, * * * for a much stronger reason it is the rule as to crossing a street railway track.”

It is difficult to conceive any basis in reason for a holding which would impose upon the driver of an automobile a duty of care, with reference to the driver of another automobile, greater than the duty of the driver of a horse approaching a street railway track, and as great as could be argued for the most strict application of the principles of the Elliott case and of the case of *Railroad Company v. Crawford*, 24 O. S., 631.

I am constrained to hold that the doctrine as to steam railroad crossings does not apply to this case.

Giving to the Moore car the right of way, and assuming as true what Herder denies, that when he emerged from the small drive he did not look or, if he did look, that he saw the Moore car some distance up the road to the east, what situation is presented as regards a jury's consideration of the case?

Wallis' car had passed beyond the center of the road. It was struck on the south side of the road, that is, the Moore car was on the left side of the road when it struck the Wallis car. If Herder had looked and had calculated, he could not have calculated more accurately with respect to his car than subsequent events indicated, viz., that he would have time to pass

over the center of the main road and reach its south side. This he did. A right of way for a driver does not include an exclusive right to the whole of the road. It includes in its most generous recognition the right to pass unobstructed and unretarded along the proper side of the highway. The mechanical and undisputed facts as to the collision were before the jury. With such a presentment, the least that can be said is, that the undisputed facts presented a situation as to negligence upon which reasonable minds might honestly differ, and as to which there might well be an earnest conflict of serious opinion. If the jury is to try the facts, few cases present more typical instances of matters which the law says belong to the province of the jury. I am convinced that for a judge to intervene and overturn the findings of the jury on the subject of negligence as here presented would be a clear and unwarranted usurpation of authority.

The jury returned a verdict of \$55,000. It is urged that the amount is so large as to indicate passion and prejudice. Passion or prejudice is not claimed to have appeared in any way other than in the amount of the verdict.

The character and appearance of the jury in this case were the subjects of favorable comment by counsel on both sides. As jurors, they appeared to be men of unusual intelligence. They were from various walks of life. Some of them were men of trained minds and occupying fairly responsible positions in the community.

The condition of the plaintiff, both before and after the injury, was testified to by many witnesses. Some of these witnesses were persons of much education, experience and skill. They had the appearance of entirely reputable persons. The claims of plaintiff were thus apparently exceedingly well fortified. Their testimony can be disregarded only upon the assumption that there existed among all of the witnesses a most extraordinary concert of purpose to deceive.

The plaintiff was shown to have had, prior to the collision, earnings of about \$15,000 per year through his personal activities. At the time of receiving his injuries he was about 43 years of age. Much testimony was adduced to support the claim that since the time of the collision he has been insane and mentally

1915.]

Weber v. Bauer.

and nervously wholly incapacitated from following his vocation. From the time of the collision to the time of the trial about three and one-half years had elapsed. The jury was instructed on the matter of measure of damage that it might take into consideration loss of earnings directly resulting from the injury. It requires, therefore, no ingenuity of analysis to apprehend an explanation for the amount of the verdict, both rational and unquestionably lawful.

Exercising, perhaps to the extreme, a prerogative which has the sanction and approval of our Supreme Court, I have exacted from the plaintiff a remittitur of \$15,000 from the amount of the verdict. This I have done with the thought in mind that the net result of trial in this court should be such as to convince disinterested judgment that the rights of defendant had been safeguarded to the utmost. Further than this I can not go. A jury's verdict is not sacred, but when a trial has been conducted with such regard for the rules of evidence and procedure as characterized this trial, when every request made by defendant for instructions to the jury and as to contents of the charge of the court has been granted; when no error has been claimed in the charge of the court; when the verdict of the jury finds such ample basis and explanation in the law and in the evidence received—to set aside this verdict and to grant a new trial would, I believe, be an inexcusable trespass upon the right of trial by jury, a right jealously safeguarded by our laws.

The plaintiff having consented to a remittitur of all of the verdict in excess of \$40,000, the motion for a new trial is overruled, and exceptions by the defendant are noted.

JURISDICTION IN ERROR PROCEEDINGS.

Common Pleas Court of Hamilton County.

CHARLES WEBER v. FRANK BAUER.

Decided January 15, 1916.

Proceedings in Error—Jurisdiction Can Not be Conferred When the Proceeding is Not Brought Within the Time Fixed by Statute.

Jurisdiction can not be conferred in an error proceeding by waiver of service of summons and the voluntary entering of appearance

by the defendant in error, when the petition in error and the bill of exceptions were not filed within the statutory period.

Walter Muhlhauser, for plaintiff.

Richard Hingson, contra.

NIPPERT, J.

The defendant in this action has filed a motion to strike from the files the bill of exceptions and the petition in error heretofore filed in this cause for the reason that the proceeding in this court was not commenced until after seventy days had elapsed since the entry of the judgment in the court below.

Section 12270 of our code was amended by the Ohio Legislature on April 28, 1913, reducing the time of the commencement of error proceedings from four months to seventy days (see 103 O. L., 835, entitled an act to amend Section 12270, General Code), as follows:

“No proceeding to reverse, vacate or modify a judgment or final order shall be commenced unless within seventy days after the entry of the judgment or final order complained of; or in case the person entitled to such proceedings is an infant, a person of unsound mind, or imprisoned, within seventy days, exclusive of the time of such disability.”

The judgment in the court below was rendered April 19, 1915, and the petition of plaintiff in error was filed in this court November 12, 1915, a period of almost six months having elapsed between the date of the judgment and the filing of the petition in error. So that upon the face of the record, in view of Section 12270 as amended, the plaintiff in error does not come within the period required by the statute.

It is a well known fact that error proceedings are strictly statutory, are not remedial, and the statute must be strictly adhered to. But the plaintiff in error advanced the theory in support of his contention that the defendant recognized the general jurisdiction of the court by indorsing upon the petition in error the waiver of the issuance and service of summons and voluntarily entering his appearance to these proceedings. The court does not think this point well taken, since the signing of a waiver and voluntary appearance of the defendant in

1915.]

Weber v. Bauer.

error after the time limit has expired can not set aside the explicit terms of the statute governing the time within which the petition must be filed, nor can the court take jurisdiction by consent after the statute has denied to the court jurisdiction in such cases.

The contention of the defendant in error is upheld by our Supreme Court in the case of *Brown v. Coal Co.*, 48 Ohio St., 542, where the court says:

“Proceeding in error, as regards the judgment rendered at January term, was commenced too late. If the plaintiff’s case in error were in other respects well founded, a review of the judgment could not now be had in this court, more than six months (act of March 28, 1889; Section 6723, Revised Statutes) having elapsed between the date of the judgment and the commencement of the error proceeding.”

Thus it appears that this court has acquired no jurisdiction of the case.

From the record in the municipal court, it appears that Frank Bauer, defendant in error, who was then plaintiff below, recovered a judgment against the defendant, Charles Weber, for \$61.63; that by consent of counsel, jury was waived and the case submitted to the court, and on April 20, the court entered the following judgment:

“This cause came on this day to be heard; plaintiff and defendant present and testified. The court being fully advised, rendered a judgment for plaintiff on his bill of particulars in the sum of \$61.63 and the costs of this action taxed at \$—; to all of which defendant by his counsel excepts.”

Thereupon, on the same day the defendant filed his motion for a new trial and a rehearing. Upon September 8, 1915, the court overruled the motion for a new trial and reaffirmed the judgment rendered against the defendant below on April 20, 1915.

Plaintiff in error now contends that the seventy days permitted under the statute in which to file these proceedings in error, should not begin to run until after September 8. the date upon which the court below overruled the motion for a new trial.

It must be remembered that the judgment entry went on record in the court below on April 20, 1915. The Supreme Court in the case of *Dowty v. Pepple*, 58 Ohio St., 395, where a question similar to the one in this case was submitted, held, that Section 6723, Revised Statutes, now Section 11270, General Code, must be interpreted as applying to the date of the entry of judgment. The facts in that case were about as follows: The case, like the case at bar, was tried to the court without the intervention of a jury. Judgment was rendered. A motion for a new trial was heard and submitted a few days after the rendition of the judgment, but owing to the continued absence of the trial judge from the county, this motion for a new trial was not passed upon until after the expiration of six months from the rendition of the judgment, and the court there said:

“The allegation of the petition in error, even if it were supported by the record, is not sufficient to take the case out of the operation of Section 6723, Revised Statutes. (Sustaining its ruling in *Young v. Shallenberger*, 53 Ohio St., 291.) ‘The statute has declared in explicit terms, that no proceeding to reverse a judgment shall be commenced unless within six months after the rendition of the judgment, and the court is powerless to enlarge its terms, if it desired to do so.’ ”

The court in the *Young* case also held that the overruling of a motion for a new trial is not a final order upon which error can be prosecuted. Error lies to the judgment, but not to the decision on the motion for a new trial. This is in harmony with the settled rule in this state, that an order of the court overruling a motion to set aside the verdict of a jury and grant a new trial, is not a final judgment or order, for the reversal of which error can be prosecuted before the final disposition of the case. This was so held in the case of *Conord v. Runnels*, 23 Ohio St., 601.

Thus, the court being powerless to enlarge the terms of the statute, even if it desired to so do, the motion of defendant in error to strike the bill of exceptions from the files and dismiss the petition of plaintiff in error herein will be granted.

1915.]

Altman v. Devou.

TENANT DAMAGED FROM BURSTING OF WATER PIPE.

Common Pleas Court of Hamilton County.

MORITZ ALTMAN V. CHARLES P. DEVOU.*

Decided, June, 1915.

*Landlord and Tenant—Application of the Doctrine of Res Ipsa Loquitur
—To the Bursting of a Water Pipe Causing Damage to Tenant's
Stock of Goods.*

Where a water pipe burst on premises controlled by the defendant and water ran down on the stock of goods of the plaintiff in the store below, and no evidence is introduced showing the cause of the bursting of the pipe, the doctrine of *res ipsa loquitur* applies and the issue of negligence on the part of the defendant should be submitted to the jury.

Oliver S. Bryant, for plaintiff in error.
Jackson & Woodward, contra.

HOFFMAN (Fred. L.), J.

This action comes into this court on error from the municipal court of Cincinnati. The plaintiff in error was a tenant under a lease from the defendant in error, of the ground floor of certain premises. During the month of February, 1914, a water pipe located on the second floor of the premises burst and the water ran down and injured the stock in the store of the plaintiff in error. All of said premises with the exception of said ground floor was under the control of the defendant in error. No evidence was introduced at the trial showing the cause of the bursting of the water pipe. At the close of all the evidence defendant in error moved for judgment and the court granted said motion on the ground that no negligence had been shown to have been occasioned by the defendant in error. This court is of the opinion that this case comes within the rule of *res ipsa loquitur*.

*Affirmed by the Court of Appeals March 9, 1916, in a memorandum opinion.

"Where a thing which causes the injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care." *Cincinnati Trac. Co. v. Holzenkamp*, 74 Ohio St., 379; *Cleveland, C. & I. Ry. v. Walrath*, 38 Ohio St., 461.

In the case of *Greco v. Bernheimer*, 17 Misc. (N. Y.), 592, the property of a tenant was damaged by the flooding of water from above. There being no proof of the cause, the court held:

"The fact that an overflow of water occurs on the floor occupied by defendant is sufficient to charge him with liability for injury to tenants on floors below in the absence of any explanation negating want of care on his part."

The court said at page 678:

"As the defendant was in the exclusive possession of the third loft from which the water came, the overflow was sufficient *prima facie* to fix liability against him in the absence of some explanation negating want of care on his part. Of course there must be some reasonable evidence of negligence, but where, as the court said in *Mullen v. St. John*, 57 N. Y., 571, the thing is shown to be under the management of the defendant or his servants, and the accident is such that in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care."

In *Simon-Reigel Cigar Co. v. Battery Co.*, 20 Misc. (N. Y.), 598, the syllabus is:

"Where water in a part of a building exclusively occupied by one tenant is negligently allowed to overflow and damage the property of another tenant in the building, the former is liable to the latter for such damage. The proof of the overflow is sufficient *prima facie* evidence of such negligence."

The court is therefore of the opinion that the issues of negligence should have been submitted to the jury. Cause remanded for a new trial to the court below.

1915.]

Assignment of Rice.

**MORTGAGED PROPERTY ASSETS IN THE HANDS OF THE
ASSIGNEE OF THE MORTGAGOR.**

Probate Court of Columbiana County.

IN THE MATTER OF THE ASSIGNMENT OF LOUIS H. RICE.

Decided, December, 1914.

*Chattel Mortgages—Assignments—Right of Assignee to Administer
Mortgaged Property—Description of Property in Mortgage—Con-
struction—Sufficiency.*

1. Where a mortgagor of personal property makes an assignment for the benefit of his creditors and the mortgaged property passes into the possession of the assignee, such mortgaged property becomes assets in the hands of the assignee to be administered by him and the interest or claim of the mortgagee is transferred and attaches to the fund arising from the sale of such property.
2. The description of property in a chattel mortgage is to be liberally construed because of the diverse and varied character of property usually sought to be covered, and the attendant difficulty in obtaining a full or exact description.
3. Parol evidence is admissible to explain or aid the description in a mortgage of chattels and to identify the property mentioned in such description.
4. A description in a chattel mortgage which mentions "all stock in trade" and "stock mdse. on hand" located at a certain number, street and city, is good at the time of execution, but in a continuing business, is later void for uncertainty and because such stock of merchandise would be changing during the course of business and a mortgage of chattels does not and can not create a lien on property, in no way mentioned in the description and not on after-acquired property without express provision to that effect.
5. A description in a chattel mortgage may refer to and be aided by a schedule of property sought to be covered by such mortgage, but to be effective as a part of the description must be attached to such mortgage and marked as an exhibit. If not so attached and marked, but reference is made, then such schedule of property is only a means of identification suggested by the description.
6. A description in a chattel mortgage which states, "All the stock in trade, fixtures and property sold to the said Louis H. Rice by Claud Taylor June 24th, 1912, and being situate in Room Number 64 East Main street, Salem, Ohio, covering show cases,

stock, mdse. on hand and every bakery tool and article used by me now in my bakery and confectionery business, whether mentioned or not. The two bay colts, the bay mare, three wagons, and one buggy and double set harness, two single sets harness—the horse are the same, in fact the property covered by this mortgage is all the property this day sold to Louis H. Rice by Claud Taylor and for a further description see Bill of Sale from Claud Taylor to said Louis H. Rice of even date herewith. It is understood that the soda fountain and accessories are covered by this mortgage and the horses are at Noling's Livery and at Grantee's barn," does not render such mortgage invalid for insufficiency of description except as to "all the stock in trade" and "stock mdse. on hand;" the remainder of said description being sufficiently definite and said mortgage valid as to all of the residue of said property sought to be covered.

Boone & Campbell, for plaintiff.

K. L. Cobourn, for the assignee.

FARR, J.

On the 24th day of June, 1912, one Claud Taylor sold to Louis H. Rice his bakery, including all stock in trade, fixtures and property at No. 64 East Main street, Salem, this county, for the sum of \$4,900, and to secure the payment of \$3,000 of said purchase price, the said Rice, on said date, executed to said Taylor six promissory notes calling for \$500 each, with interest at 6%, and concurrently therewith executed and delivered with said notes, a chattel mortgage to secure the payment of the same, which mortgage was, on the — day of July, 1912, duly filed with the recorder of Columbiana county, and on the 26th day of October, 1914, said Rice filed a deed of assignment in this court to L. B. Harris, Esq., as assignee, transferring, among other things, all of the property claimed to be covered by said chattel mortgage.

On November 6th, 1914, said Claud Taylor, mortgagee, filed a petition in this court asking a temporary restraining order against said assignee to prevent the sale of said property until the rights of said mortgagee in and to the same could be determined and for such other relief as in law or equity he might be entitled to demand and receive. Said temporary order was granted and thereafter said cause was duly heard upon its merits.

1915.]

Assignment of Rice.

The first issue raised is, that the mortgagee and not the assignee is entitled to the possession and control of the personal property claimed to be covered by said chattel mortgage; that is, that the assignee has no right or authority to administer upon any property covered by said chattel mortgage. The general rule is that the lien holder loses, by the assignment for creditors, no rights previously acquired and that he may foreclose at will regardless of the assignment and such is the holding in numerous jurisdictions; however, a different rule prevails in this state. In "Gianque's Manual for Assignees" at page 55e it is observed as follows:

"But it seems clear that at least the remedies of the holders of such liens in Ohio are subject to its assignment laws, and are so modified thereby that, at least in the case of mortgaged chattels *which come into the possession of the assignee*, the lien holder's interest in the assigned property subject to the lien is transferred to the fund arising from the sale of the property by the assignee."

The foregoing is fully sustained in principle in *Lindeman v. Ingham*, 36 O. S., 1, as follows:

"Where a mortgagor in possession of goods mortgaged, makes an assignment thereof for the benefit of his creditors, and the assignee proceeds in the probate court to administer the trust, in accordance with the statutes regulating such assignments, the mortgagee can not maintain an action against the assignee for converting the property to his own use. In such case, his interest in the property under the mortgage, where the assignee is clothed with authority to sell the goods, is transferred to the fund arising from the sale by the assignee. And it will make no difference that the condition in the mortgage was broken at the time of the assignment."

To the same effect it was held in the case of *Ingham v. Lindeman*, 37 O. S., 218, 220, in the first section of syllabus as follows:

"1. Under the act of 1859, 'regulating the mode of administering assignments in trust for the benefit of creditors; mortgaged chattels in possession of the assignor (mortgagor) pass to the assignee and become assets in his hands to be administered, notwithstanding the condition of the mortgage was broken be-

fore the assignment. *Lindeman v. Ingham*, 36 Ohio St., 1, approved."

Likewise it was held in *Lingler v. Wesco*, 79 O. S., 241; *Sayler v. Simpson*, 45 O. S., 141; *In re Brocamp*, 2 C. C., 375.

The reasons for the foregoing are obvious. The property having passed into the possession of the assignee, he becomes the representative of both the assignor and the creditors, and for their benefit, must conserve the interests of the estate. To the creditors he must pay the debts and to the assignor the overplus from the sale of assets, if any, after the payment of such debts. If the creditor were permitted to reclaim the property from the assignee, it might involve the sacrifice of whatever equity the assignor might have in the property and also seriously embarrass and interfere with the proper administration of the estate. Moreover, Section 11115, General Code, which provides that the assignee shall convert the assets into money, is mandatory. It reads as follows:

"Sec. 11115. The assignee, or trustee, shall proceed to convert the assets received by him into money, and to sell the real and personal property assigned, including stocks and such bonds, notes and other claims as are not due and which can not probably be collected within a reasonable time, at public auction, either for cash or upon such other terms as the court orders."

In view of all the foregoing it must be held that all the property covered by said mortgage must be administered by said assignee.

The second and last issue raised is, that the description of property in said mortgage is insufficient as to some parts thereof. Said description reads as follows:

"All the stock in trade, fixtures and property sold to the said Louis H. Rice by Claud Taylor June 24th, 1912, and being situate in Room number 64 East Main street, Salem, Ohio, covering show cases, stock, merchandise on hand and every bakery tool and article used by me now in my bakery and confectionary business whether mentioned or not. The two bay colts, the bay mare, three wagons, and one buggy and double set harness, two single sets harness—the horses are the same in fact the property covered by this mortgage is all the property this day sold to

1915.]

Assignment of Rice.

Louis H. Rice by Claud Taylor and for a further description see bill of sale from Claud Taylor to said Louis H. Rice of even date herewith. It is understood that the soda fountain and accessories are covered by this mortgage and the horses are at Noling's livery and at Grantee's barn."

It will be observed that a liberal construction is to be given to descriptions of goods and property described in a chattel mortgage (*1 Schouler's Per. Prop.*, p. 538); and the rule is well founded in reason because parol evidence is, by the great weight of authority, admissible to show the identity of the property mortgaged. *Duke v. Strickland*, 43 Ind., 494, 498; *Dickey v. Waldo*, 23 L. R. A., 461, n.; *Chapin v. Crane*, 40 Me., 293; *Elder v. Miller*, 60 Me., 118; *Brooks v. Aldrich*, 17 N. H., 443; *Cummins v. Newton*, 10 Allen, 518; *Putman v. Cushing*, 10 Gray, 334; *Crosby v. Baker*, 6 Allen, 295; *Merril v. Keyes*, 14 Allen, 222; *Welch v. Sackett*, 12 Wis., 243; 23 L. R. A., 461, n.; 94 N. C., 104; 39 N. H., 557; *Jones on Chattel Mortgages*, Sections 53 and 64; *Harding v. Cobourn*, 12 Met. (Mass.), 333; *Winslow v. Merchants Ins. Co.*, 4 Met. (Mass.), 306; *Wiley v. Snyder*, 34 Mich., 60; *Goff v. Pape*, 83 N. C., 123; *Morse v. Pike*, 15 N. H., 529; *Burditt v. Hunt*, 25 Me., 419; *Wolfe v. Dorr*, 24 Me., 104; *Herman on Chattel Mortgages*, Section 39, p. 77 and numerous cases cited; 9 Am. Cent. Dig., Col. 2373, Section 102; 6 Cyc., 1034; 5 Ency. of L. (2d Ed.), 964.

The question is practically settled, however, in this jurisdiction in case of *Lawrence v. Evarts*, 7 O. S., 196, in which Swan, J., observes:

"The mortgagee may show by parol evidence, what articles were in and about the shop when the mortgage was made."

Therefore it follows that if a written instrument may be so aided by parol evidence, that such descriptions must be liberally construed. Moreover, such rule of construction is right because by reason of the diverse nature and character of much of the property usually covered by chattel mortgages, it is difficult and practically out of the question to obtain an exact or perfect description; therefore the necessity of parol evidence to aid such description and the equal propriety of a liberal construction is

readily apparent. As to the sufficiency of description in chattel mortgages, there has been a very wide range of discussion and almost innumerable decisions. Probably one of the shortest and best general rules is found in 9 Cent. Dig., Col. 2348, Section 87, as follows:

"A description of property in a chattel mortgage is sufficient which enables a third person, aided by inquiries which the instrument itself suggests, to identify the property."

The foregoing is sustained by a large number of cases, including that of *Lawrence v. Evarts*, 7 O. S., 194; *Burke v. Linkmeyer*, 32 C. C., 188; 13 C.C.(N.S.), 224. Also 6 Cyc., 1022, and numerous cases cited; 5 Ency. of L., 956; *Jones on Chattel Mortgages*, Section 54; *Herman on Chattel Mortgages*, Section 38, p. 73. The reason for the above rule is readily apparent. Because a chattel mortgage necessarily involves, as above stated, property of diverse and varied character, making an accurate or exact description difficult to obtain. "Aided by inquiries which the instrument itself suggests," is very broad and very liberal in terms and contemplates that no chattel mortgage shall fail for insufficiency of description, if parol evidence based upon inquiry suggested by the instrument, will preserve it.

The mortgage in question purports to create a lien upon all of the property sold and conveyed by the mortgagee to the mortgagor on June 24th, 1914, consisting of all stock in trade, bakery fixtures, tools, and machinery, horses, buggies and wagons, and confectionery equipment.

"All stock in trade" is first mentioned, also "stock in mdse." is included. Said stock in trade and merchandise then in the building where it states that said merchandise was located was undoubtedly within the lien of the mortgage at the date of the same, but the stock of merchandise is not now in said store or bakery; like all other similar stocks it was constantly changing; it was somewhat different in the next week and there was still greater difference in the next month; and, as time passed, doubtless a large part of the old stock had been replaced by newer and different goods and this peculiar character of merchandise changes even more rapidly than other kinds or classes. In fact,

1915.]

Assignment of Rice.

it is difficult to effectuate a valid lien upon merchandise of any character without either a transfer of possession or very careful wording of description and the making of certain necessary provisions in relation thereto (*Jones on Chattel Mortgages*, Section 71; *Sharpe v. Pearce*, 74 N. C., 60). It was held in the well considered case of *Rocheleau v. Boyle*, 11 Mont., 451; 28 Pac., 873, in the second section of the syllabus as follows:

"2. Where a mortgage properly acknowledged and filed, was given on the 'stock on hand' and other property of a baker, who was allowed to retain the possession thereof, and who continued to sell the stock in the regular course of trade, but did not apply the proceeds of such sales to paying the mortgage, such mortgage is void as regards the stock in trade." * * *

The foregoing is founded in reason and it follows, therefore, that the description in said mortgage in so far as it relates to "stock in trade" and "merchandise" must be held to be insufficient. The fixtures, tools and machinery of the bakery are not enumerated, but are described as situated in the room at No. 64 East Main street, Salem, Ohio, and sold to Louis H. Rice by Claud Taylor; they are further described by reference to a bill of sale of even date therewith. It is well settled that a description may be completed by reference to a schedule. *Van Heusen v. Redcliff*, 17 N. Y., 580; 72 Am. Dec., 480; *Newman v. Tymeson*, 13 Wis., 172; 80 Am. Dec., 735; *State v. Cooper*, 79 Mo., 464; *Winslow v. Merchants Ins. Co.*, 45 Mass. (4 Met.), 306; *Page v. Kendig* (N. J.), 7 Atl., 878.

The schedule, however, should be attached to the mortgage, and if not, it becomes only a means of identification suggested by the description. There are very numerous adjudications in other jurisdictions concerning the sufficiency of description in chattel mortgages, a few of those in point with the case at bar and practically holding the greater part of said description sufficient, are as follows: *Cooper v. Berney Nat. Bank*, 99 Ala., 119; 11 So., 760; *Muncie Nat. Bank v. Brown*, 112 Ind., 474; 14 N. E., 358; *Harding v. Cobourn*, 53 Mass. (12 Metc.), 333; 46 Am. Dec., 680; *Adamson v. Horton*, 42 Minn., 161; 43 N. W., 849; *Morris v. Connor*, 108 N. C., 321; 12 S. E., 917; *Knapp, Stout & Co. v. Dietz*, 64 Wis., 31; 24 N. W., 471; *Wolfe v. Dorr*,

24 Me. (11 Shep.), 104; *Burditt v. Hunt*, 25 Me. (12 Shep.), 419; 43 Am. Dec., 289; *Shaw v. Glen*, 37 N. J. Eq. (10 Stew.), 32; *Conkling v. Shelley*, 28 N. Y., 360; 84 Am. Dec., 348; *Crow v. Red River County Bank*, 52 Tex., 362; *Dillon v. Dillon*, 13 Wash., 594; 43 Pac., 894.

It was held in *Wagner v. Watts*, 2 Crauch C. C., 169, that:

"A mortgage of the whole of my stock of books and stationery now remaining in my possession, and also such additions thereto as I may hereafter make from time to time to the same, is not void for uncertainty."

In the case at bar there is no provision as to stock or merchandise to be thereafter purchased. Again, it was held in *Ebberle v. Mayer*, 51 Ind., 235, that:

"A chattel mortgage described the property mortgaged as all stock, tools, fixtures and materials now on hand in the shop formerly occupied by A. on Central avenue in the city of Madison, Ind., and being the same property this day sold to us by said A., as in the invoice to us mentioned. *Held*: That the description was sufficient to protect the rights of the mortgagee against the vendee of the mortgagors."

It was likewise held in *Duke v. Strickland*, 43 Ind., 494. The foregoing is well in point in the case at bar.

To the same effect it was held in *Shaw v. Glann*, 37 N. J. Eq. (10 Stew.), 32, as follows:

"A description in a chattel mortgage of all stock, fixtures, goods, and chattels of every name and kind in a designated store is specific enough to identify the property intended to be covered."

Also, it was held that:

"A description of personal property in a chattel mortgage, stating in general terms its character, and specifically stating in what building and rooms it is situated, is sufficient. *Muncie Nat. Bank v. Brown*, 112 Ind., 474; 14 N. E., 358."

The question is fairly well determined, however, in this jurisdiction in the above case of *Lawrence v. Evarts*, 7 O. S., 196, in which Swan, J., observes as follows:

1915.]

Assignment of Rice.

“A mortgage of all the stock of tools and chattels belonging to the mortgagor in and about the wheelwright shop occupied by him is not void as to creditors; and the mortgagee may show by parol evidence what articles were in and about the shop when the mortgage was made.”

In full harmony with the foregoing are the cases of *In re Brannock*, 131 Fed., 819, *In re Beede*, 126 Fed., 853; *Nelson v. Howison*, 122 Ala., 576; 25 So., 211; *Williamson v. Wylie*, 69 Mo. App., 512; *Simonson v. McHenry*, 92 Pac., 906; *State Bank of West Union v. Keeney*, 114 S. W., 553; 134 Mo. App., 74; *Clement v. Congress Hall*, 132 N. Y. S., 16; 72 Misc. Rep., 519.

The next and last items of said description to be considered are the horses, wagons, buggy and harness. These articles and property are mentioned as the two bay colts, the bay mare, three wagons and one buggy and double set harness, two single sets harness, and are further described as “property this day sold to Louis H. Rice by Claud Taylor and for a further description see bill of sale from Claud Taylor to Louis H. Rice of even date with said mortgage.

It is also stated that “the soda fountain and accessories are covered by said mortgage and the horses are at Noling’s livery and at grantee’s barn.” Is the foregoing a good description? Could a third person, upon inquiry suggested by the above, locate the property? As to the horses, it is stated that they were two bay colts, the bay mare; that they were at Noling’s livery and at grantee’s barn; it is stated that they are the same as sold that day by mortgagee to mortgagor, and reference is made to the bill of sale. It was held in *William v. Crook*, 63 Miss., 9, that the description of a horse by age and color, and as being in the possession of the mortgagor at the time the mortgage was executed is sufficient. The age, however, is not given in the case at bar. Again, it is held in *Griffiths v. Wheeler*, 31 Kas., 17; 2 Pac., 842, that “a description of cattle is sufficient if from it, and from inquiries suggested by the mortgage, the cattle intended can be ascertained.” Likewise, it was held that:

“A chattel mortgage describing the property as eight horses being the same now in stable No. 19, Silver St., is sufficient as against a subsequent purchaser of two of the horses, even though

at the time the mortgage was executed and for some time previous and subsequent thereto many other horses not owned by the mortgagor were constantly boarded at that stable." *Elder v. Miller*, 60 Me., 118.

To the same effect it was held that:

"A description in a chattel mortgage, including all horses belonging to the mortgagor in a certain county and the counties thereto adjoining was not void for uncertainty." *Lapowski v. Taylor*, 13 Tex. Civ. App., 624; 35 S. W., 934.

And in *Rauch v. Howard-Sansonn Co.*, 3 Tex. Civ. App., 507; 22 S. W., 773, it was held:

"A statement in a due bill that the same had been given for a certain number of mules without other description. is not so indefinite as to prevent the operation of the bill as a mortgage."

A case well in point is that of *Johnson v. Gerber*, 130 N. W., 995, which holds that:

"A chattel mortgage, describing the property as '14 cows all in the possession of the party of the first part, in the city of St. Paul, Ramsey county, Minnesota,' sufficiently describes the mortgaged property."

Similar in principle are the cases of *Tolbert v. Horton*, 33 Minn., 104; 22 N. W., 126; *Kenyon v. Tramel*, 71 Iowa, 693; 28 N. W., 37; *State Nat. Bank v. Cudahy Packing Co.*, 126 Fed., 543; affirmed 134 Fed., 538; 67 C. C. A., 662; *Bank of America v. Waggoner*, 143 Fed., 53; 74 C. C. A., 207; *Alferitz v. Ingalls*, 83 Fed., 964; *Hurt v. Redd*, 64 Ala., 85; *Boyle v. Miller*, 93 Ill. App., 627; *Burns v. Harris*, 66 Ind., 536; *Cayford v. Brickett*, 89 Me., 77; 35 Atl., 1018; *Barker v. Wheelip*, 24 Tenn. (5 Humph.), 329; 42 Am. Dec., 432; *Desany v. Thorp*, 70 Vt., 31; 39 Atl., 309.

Mr. Jones in his work on chattel mortgages pertinently observes at Section 54, p. 57, as follows:

"Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties

1915.]

Assignment of Rice.

at the time. They are not prepared for strangers, but for those they are to affect—the parties and their privies. *State v. Logan*, 100 N. C., 454.”

It must be concluded from all the foregoing that courts as well as text-writers have generally sanctioned the liberal construction of ambiguous descriptions in chattel mortgages. A third person could have examined the bill of sale concerning the horses and other property; he could have made inquiry of Claud Taylor, the mortgagee, who was familiar with all of said property, or he could have inquired at Noling's livery concerning the horses, and likewise of the harness and vehicles and doubtless received helpful and reliable information, sufficient, no doubt, to identify the property mentioned in said mortgage, and he might refer to the bill of sale to which reference is made and obtain additional information. Said bill of sale is not a part of the description, however, because not attached to said mortgage and, as above stated, could be used only as a basis for definite parol evidence to explain or aid the description. Nor can the lien of said mortgage be extended so as to cover property not mentioned or after acquired property, there being no provision to that effect (Section 71, *Jones on Chattel Mortgages*; *Sharpe v. Pearce*, 74 N. C., 60, above noted, and *Barbin v. Zetlmaier*, 6 O. D., 189). A part of said description is fairly close to the line, so far as being sufficiently definite is concerned, but by reason of the fact that a general statement is made that the description embraces *all* of the property sold that day to mortgagor by mortgagee and describes the location of most of it, and that reference is made to the bill of sale which is suggested in said description as a further means of identification, it is sufficiently definite and therefore the lien of the mortgage attaches to the bakery outfit, horses, harness, wagons, buggy and confectionery equipment, but not to the stock in trade or merchandise. The temporary restraining order heretofore issued is dissolved and discharged and a permanent injunction refused. An entry may be taken in accordance with the foregoing.

**IRREGULAR MARKING OF BALLOTS UNDER THE
AUSTRALIAN SYSTEM.**

Common Pleas Court of Hamilton County.

FRANK E. MICHEL v. HENRY J. NAILOR.*

Decided, December, 1915.

*Elections—Ballots Improperly Marked Should be Counted, When—
Crosses Wrongly and Inconsistently Placed—Intention of Voter
Controls When Ascertainable.*

The right of suffrage should not be denied to a voter because of his failure to follow the strict letter of the law in the marking of his ballot, and while laxity in the marking of ballots by those who know how should not be encouraged, yet in the case of irregular markings and erasures by a voter who evidently acted with an honest purpose, his ballot should be counted if his intention can be ascertained with reasonable certainty.

John Thorndyke, for plaintiff.

Samuel B. Hammel and Joseph W. O'Hara, contra.

WARNER, J.

This is a proceeding on the part of Frank E. Michel to contest the election of Henry J. Nailor to the office of mayor of the municipality of St. Bernard at an election held on the 2d day of November, 1915.

A count of the ballots cast at said election for said office was made by the deputy state supervisors of elections in the presence of the court and counsel for the parties, the result of which was 707 uncontested votes for said Michel, and 704 uncontested votes for said Nailor, and 4 contested ballots. One of said four contested ballots it is conceded by counsel must be thrown out because the voter put a cross-mark on the left of each and every name on both tickets.

Contested ballot, Exhibit 3, shows no marks whatever on

*Affirmed by the Court of Appeals without opinion, March 14, 1916.

1915.]

Michel v. Nailor.

the Citizens ticket. The Democratic ticket has a cross in the circle, and an additional cross-mark at the left of all the names on the ticket, except Nailor and another. Section 5070, General Code, paragraph 5, distinctly declares that when a ticket is so marked the cross before the names of the candidates "shall be treated as surplusage and ignored, and the ballot be counted for *all* the candidates on the ticket." This provision determines the construction to be given a ballot so marked and this ballot must therefore be counted for the contestee, Nailor, although the absence of the very personal cross-mark before his name would seem to indicate an intention not to vote for him.

The two remaning contested ballots present questions of more difficulty.

The ballot, Exhibit 1, has a cross-mark in the circle of each of the two tickets. No other cross-marks appear anywhere on the ballot, but the voter erased with lead pencil lines drawn through them, names on each ticket, so that both tickets taken together contain unerased the correct number of names for each office to be filled. On this ballot the name of the contestant Michel was erased.

The ballot, Exhibit 4, has a cross-mark *after* the name of contestee Nailor but within the rectangular space containing his name, and the same marking appears after two other names on the Democratic ticket. No other marks of any kind appear on this ballot.

The purpose and intent of the Australian ballot law is well stated in the title to the act, "To insure the secrecy of the ballot, and prevent fraud and intimidation at the polls."

Section 21 of that act as amended, now Section 5070, General Code, paragraph 7, declares "or if, for any reason, it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for such office." Paragraph 9 of said section declares "No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice."

Paragraph 7 suggests, and said paragraph 9 distinctly asserts a limitation, or proviso, upon the strict letter of the law as to

the marking of ballots, and the intent of these provisions seems to be that a given ballot shall be counted if it is possible to determine the voter's choice, with reasonable certainty, from the cross-marks and erasures placed thereon.

The reason for these provisions is very apparent. The rules for marking a ballot necessarily apply to all classes and conditions of voters, from the most intelligent down through every grade to the lowest in the scale of intelligence. The voter who takes a ballot and retires to a booth to mark the same may well be presumed to know for whom he wants to vote, but experience shows that in many instances he may not express his choice in strict accordance with established rules. This state of affairs was undoubtedly anticipated and to an extent provided for in the provisions of the law quoted above. It was doubtless felt by the law makers that the great and important right of suffrage guaranteed to the citizen by the Constitution should not be denied to one who has made his ballot reasonably certain in expressing his choice.

The courts of this state are not in entire agreement as to the construction of this statute.

In *Re Bennett*, 8 O. N. P., 395, one of the first cases arising under this law, the question was whether a ballot with a cross-mark in the circle of one ticket, and a cross-mark *after* a name on another ticket, should be counted for that name, and the question was decided in the negative. The case was heard by the probate judge of this county and a freeholder's jury of three members, and came up as the result of a contest over the election of a solicitor for the municipality of Bond Hill. The probate judge charged the jury that "the provisions of the Australian ballot law pertaining to the color of the pencil to be used in marking, the kind of a mark by which the voter indicates his choice, and the place where the mark is to be put upon the ballot are mandatory, and must be substantially complied with before the ballot becomes a legal one and can be counted." On error to the common pleas, and later to the circuit court, the judgment in the case was affirmed by both courts without report.

Grave doubts have arisen as to the correctness of this deci-

1915.]

Michel v. Nailor.

sion in certain particulars because of later decisions of the Circuit Court of Brown County, affirmed by the Supreme Court without report, and of the Circuit Court of Columbiana County. The Brown County case was *Bambach v. Markley*, 9 C.C.(N.S.), 560. The question in this case was as to whether certain ballots informally marked should be counted for the contestant, Bambach, and it was decided in the affirmative. Bambach was a candidate for common pleas judge and his name was the only one on a certain non-partisan ticket. The court held that "if a voter makes a mark above or below or on the side, or at the top of the column, occupied by the name of the non-partisan candidate, his intention to vote for such candidate is clearly indicated and the ballot should be counted." (Affirmed 76 O. S., 636, without report.)

The following extracts from the opinion at page 567 indicate the principle upon which the case was decided:

"It is a rule of construction laid down by all text-writers upon the subject of counting votes that the primary step is to determine if possible the intention of the voter, and where that can be done no vote should be thrown out. * * * The courts, therefore, have construed all those Australian ballot laws in a liberal manner. * * * In obedience to this rule of construction, if from an inspection, and from the evidence it is possible to determine the intention of the voter, you must do so."

In the Columbiana county case, *Figley v. Conser*, 5 C.C. (N.S.), 119, the court declared that the Australian ballot law properly and liberally construed "does not render invalid a ballot upon which the contestant's name was written with a blue pencil, nor a ballot upon which a black pencil line is drawn through the name of a candidate, and the name of an opposing candidate written near and partly over it, notwithstanding no cross-mark appears opposite the latter's name."

These two cases, and others that might be cited, show that the courts recognize the limitations of certain classes of voters and have, therefore, in obedience to the requirements of the paragraphs quoted, held that if from the cross-marks and erasures

placed upon the ballot the intention and choice of the voter can be determined with reasonable certainty his vote should be counted.

This, however, is not intended to encourage laxity in the marking of ballots by those who understand how, but seeks to give effect to what is manifestly intended by one who does not understand how. Voters are generally honest and do the best they can in marking a ballot. A liberal interpretation of the law is not intended to foster fraud, or negative the secrecy of the ballot.

Applying these principles to the two remaining ballots, how stands the case:

In ballot, Exhibit 1, the name of the contestant Michel was erased, thus clearly showing that the voter did not intend to vote for him, and the cross-mark in the circle of the ticket upon which his name appears could have no possible reference to him, and so far as he is concerned may properly be treated as a nullity.

The name of the contestee Nailor appearing upon the other ticket with a cross-mark in the circle of that ticket makes it very certain that the voter intended to cast his ballot for the contestee, and it must be so counted. The ballot, Exhibit 4, has a cross-mark after the name of the contestee Nailor, but within the rectangular space where his name is printed. There are no marks on the other ticket. The placing of the cross-mark after his name does not appear to have been done for any ulterior or improper purpose, but seems to be the act of an honest voter who did not understand just how to mark his ballot right. I think his intention is plain and that his choice for mayor was the contestee Nailor, and this vote must be counted for him.

Ordered accordingly.

1916.]

Heimlich v. Dispatch Prtg. Co.

**ALLEGED LIBEL IN PUBLICATION OF ARREST ON CHARGE
OF PERJURY.**

Common Pleas Court of Franklin County.

SAMUEL HEIMLICH V. THE DISPATCH PRINTING COMPANY.

Decided, 1916.

Libel—Publication of Arrest for Perjury as Result of Investigation—Ultimate Fact as to Privilege is for the Jury—Presumption of Publication Without Malice—Constitutionality of the Statute Relieving Publisher of Criminal Prosecution for Libel—Inaccuracy of Report Constitutes Scintilla of Malice—How Express Malice May be Shown Against a Corporation—Issue as to Truth of Publication Raised, When—When a Case is Pending in the Police Court—Determination as to When Prosecution Was Begun—Publication as to Investigation of Alleged Frauds in the Initiative and Referendum Privilege When Not Done with Malice.

1. Where defense of privileged publication as being a fair and impartial report of the filing of an affidavit and issuance of a warrant in police court and of pendency of criminal case therein, as well as claim of fair and impartial report of proceedings before state officers, is entered against a cause for libel *per se*, and the facts are disputed touching the existence of express malice, or if the facts relating to the fairness or impartiality of the report be controverted, or if there is some evidence *tending* to show inaccuracy or partiality in the report, then the question of the ultimate fact of privilege is for the jury to determine.
2. When the privileged occasion fact is shown, a presumption arises therefrom that the publication was without malice, which remains with defendant until rebutted by evidence of express malice. The use of the term "maliciously" in the statutes, Sections 11343-1 and 11343-2, relieving the publisher of report of proceedings in court, filing of affidavit, etc., unless it is proved to have been published "maliciously," is held to mean and comprehend "express malice," because the intent and purpose of the amended statutes was to abrogate the old rule which allowed action for simple malice in law. That the statute thus allows redress for actual malice notwithstanding privileged occasion is another reason for holding the statute constitutional.
3. The question of express malice is for the jury, where there is some evidence *tending* to show it. Inaccuracy of report, or comment

by publisher may constitute a scintilla of evidence of express malice, although a mere mistake innocently made through excusable inadvertence can not in any case be evidence of malice. While express malice may be shown by hatred or individual spite or malevolence as between individuals, still this can not be so as against a corporation, in which case it must be established by evidence of a wrongful act intentionally done, without just cause or excuse, as where a publication clearly appears to have been made with reckless disregard of another.

4. Though truth be not pled by defendant, still the issue is raised if plaintiff offers evidence as part of his case tending to show the falsity of the charges. Presentation of such issue renders it necessary to submit the case to the jury, it being essential for this question to be first determined, prior to the issue of privilege and malice.
5. The filing of an affidavit and the issuance of a warrant causes the jurisdiction of the police court to at once attach, resulting in the pendency of a criminal case therein, which is in no wise affected by the entry of the words "Affidavit withdrawn July 22, 1913, on a record not official."

In the absence of testimony to the contrary the date of the filing of the affidavit is controlling for all purposes, especially if a publisher claims privilege in reliance thereon in a cause for libel. Where the file marks of the affidavit and the issuance of the warrant date as April 21, 1913, such date is controlling, although the clerk is unable to state what date is correct. The fact that no official record was made of the filing of the affidavit and the issuance of the warrant is immaterial because the record is but the record of the fact.

6. The constitutional provision vesting the supreme executive power of the state in the Governor (Article I, Section 5) clothes the Governor with important political power and police power, vesting such officer with the exclusive discretion and judgment in its exercise, for him to determine and for what purpose and how he shall use such power. Pursuant to such power such officer has the right to make investigation into frauds in the use of the initiative and referendum, and may call to his assistance the Attorney-General, and other assistants, all such acts, information, facts, done and performed in this behalf constituting a "proceeding" within the meaning of Section 11343-1 rendering fair and impartial publication of reports of proceedings before state officers privileged, unless the same be published maliciously.

[Syllabus by the court.]

1916.]

Heimlich v. Dispatch Prtg. Co.

Joseph L. Stern and C. A. McCleary, for plaintiff.

Smith W. Bennett and W. R. Pomerene, contra.

KINKEAD, J.

The action is to recover \$100,000 damages for libelous articles published of and concerning plaintiff as follows:

"As the result of the investigation made by W. D. Yaple, at Chillicothe, into the referendum petition filed from that place, a warrant was sworn out Monday evening for the arrest of Samuel Heimlich (meaning plaintiff) an attorney of Cleveland, who circulated petitions there, charging him (meaning the plaintiff) with perjury. The perjury consisted in swearing that the name of B. F. Butler on a petition that he (meaning plaintiff) filed was genuine. It (meaning thereby the name of B. F. Butler to said referendum petition) is declared by Butler to be a forgery" (meaning and intending thereby to mean that the plaintiff either forged the name of the said B. F. Butler or aided and assisted in causing the name of said B. F. Butler to be forged).

"The Attorney-General's office, however, expects to file another warrant against Heimlich (meaning plaintiff), based on other evidence of alleged fraud in connection with the same law.

"McMillan is attorney for Samuel Heimlich (meaning plaintiff) of Cleveland who (meaning plaintiff) is now charged with perjury."

The defense of privileged publication as to the first cause of action under both Sections 11343-1 and 11343-2, General Code, as being impartial reports of proceedings in the police court of the city of Columbus in *State v. Heimlich*, in which an affidavit for perjury was filed and warrant issued, as also an impartial report of proceedings before the Governor and Attorney-General in the matter of the investigation into initiative and referendum petition frauds and irregularities.

The evidence disclosed that the Governor instituted the investigation, calling upon other officials and other persons to aid therein, using a special contingent fund allowed the Governor for use by him for just such an emergency.

The plaintiff was engaged in circulating petitions and information came to the Governor of alleged irregularities on his part in obtaining signatures. He was ordered to be arrested on a charge of perjury by the Governor. The first affidavit was filed July 21, 1913, and warrant was issued, but no arrest was made. On July 22, 1913, on a warrant book, an unofficial record, a memorandum was made "warrant withdrawn." Another warrant on another charge was filed against plaintiff in the morning of July 22. The publication of the article in the first cause of action was made on July 22, the first issue of the paper being 10:15 and other later ones on the same day.

At the close of all the evidence counsel for defendant moved the court to arrest the case from the jury and direct a verdict in its favor.

The contention of the defendant is that the facts and circumstances under which the publications were made are not in dispute and that they are of such character that there can be no reasonable doubt in the mind of any one that the report was fair and impartial, and that there was no express malice. Therefore, the privilege must prevail and a verdict in favor of the defendant be directed.

Counsel for the plaintiff, on the other hand, insists that the facts relating to the privilege are in dispute. They contend also that the evidence introduced tends to show express malice. If either of these claims asserted by plaintiff is true, then of course the case must go to the jury.

The first question to be considered is the one of privileged occasion.

It is sufficient to merely state that the statute makes privilege a fair and impartial report of "the issuing of any warrant" or "the filing of any affidavit" in any criminal case, as well as a fair and impartial report of the contents thereof. The statute also makes privileged the publication of a fair and impartial report of the proceedings before state officers (Sections 11343-1, 11343-2). Such publications are made privileged unless they are proved to have been "made maliciously." The word "maliciously," as it is used in that statute, must be held

1916.]

Helmlich v. Dispatch Prtg. Co.

to mean and comprehend "express malice" because the intent of the statute was to abrogate the old rule which gave a cause of action for simple malice in law.

It must be concluded that the statute intended to mean that the privilege was to be available to a defendant unless actual or express malice be shown, for the reason that the amended statutes were passed to destroy or take away the right of action where only presumptive malice appeared, or malice in law was present.

The claim is made by defendant that the so-called investigations lately made by the Governor, the Attorney-General and the Secretary of State concerning frauds committed in the use of the initiative and referendum petitions are within the purport and meaning of the statute. The right and authority of the Secretary of State when acting as state supervisor of elections to hear and determine the sufficiency and validity of all provisions filed with him under the provisions of Article II, Section 1c of the Constitution, has been recognized and established by decision of the Supreme Court, *State v. Graves*, 90 Ohio St., 311.

This being true, it remains for this court to determine whether whatever part the Governor or the Attorney-General—either one or both of them—took in the matter of investigating into the existence of such frauds and the misuse of the initiative and referendum, comes within the meaning of the proceedings such as are contemplated by Section 11343-1, General Code, prescribing the privilege of the publication of reports of things done by such officer or officers. We are not to be captious or technical concerning the purpose and meaning of the terms "proceedings," especially as we must not look upon that term alone in the light in which we are accustomed to regard "proceedings" with reference to courts of justice. It must have reference to such act or acts as the Constitution or statute authorizes state officers to do and perform in the line of their duty prescribed by law. The Constitution provides that "the supreme executive power of this state shall be vested in the Governor." Article III, Section 5.

It has been held that this provision clothes the Governor with important political powers in the exercise of which he uses his own judgment or discretion, and in regard to which his determinations are conclusive. *State v. Chase*, 5 Ohio St., 528, 535.

The supreme police power of the state which, as is well understood, is not circumscribed or limited by any statute, the same being vested within the exclusive discretion and judgment of the Governor. It is wholly and entirely within his uncontrolled discretion for him to determine when and under what circumstances and for what purpose and how he shall use its power.

The evidence introduced discloses that certain abuses and alleged frauds were practiced by persons connected with the use of the new provision of the Constitution, the initiative and referendum. The evidence discloses that knowledge had come to the Governor that the provisions of the Constitution, in his judgment, were being misused and had been frequently violated, thus distorting the purpose of the new instrument and the new method of law making, so that the rights of the government were being violated, if such frauds were committed. In this emergency the Governor commenced an investigation, calling to his aid the Attorney-General, who is his legal adviser and who in fact in such a matter is subject to his direction. He also called to his aid certain other persons to investigate and discover any possible irregularities in the petitions for a referendum on the workmen's compensation law. It is made clearly to appear that the purpose of the Governor in making such investigations was that if irregularities and frauds were discovered he intended to set in motion any criminal laws that would lead to the punishment of those involved. It also was his purpose, if any such irregularities were discovered, to have the matter investigated by an officer of the law to whom especially is delegated the power over the election machinery of the state.

It must therefore be concluded that any and all acts done and performed by the Governor and by the Attorney-General

1916.]

Helmlich v. Dispatch Prtg. Co.

and by those called into service by either one or both of such officers, are to be considered as within the contemplation of the statute and a proceeding for the investigation into irregularities and frauds in the use of the initiative and referendum in the procurement and filing of petitions thereunder. It follows therefore that the publication of a fair and impartial report of the acts done pursuant to such investigation by such officers or by their assistants or others acting under their direction, shall be privileged, unless it shall be proved that the publication complained of was made maliciously, or that it was published with express malice as that term must be defined.

The claim is made by the defendant that the publication set forth in the first cause of action is privileged as being both a fair and impartial report of proceedings in the police court of Columbus, as well as of proceedings then being had before the Governor, the Secretary of State and the Attorney-General.

The publication antedated the proceedings begun before the Secretary of State, so that whatever privilege may be claimed by the defendant must come within the statute which may make privileged any proceeding had before the Governor or the Attorney-General. So far as that cause of action is concerned then, the Secretary of State's investigation or the proceeding that was thereafter instituted is not to be considered.

Having set forth the law as to the privileged occasion, we come to a consideration of the facts.

Now as to the first cause of action and as to the claim of privilege on account of its being a report of a proceeding in the police court, the facts are undisputed that an affidavit was filed in the police court on July 21, 1913. It is undisputed also that a warrant was issued by the clerk of the police court on that day.

Counsel for plaintiff deny that the facts with reference to this were undisputed. Counsel dispute the facts. It seems that the clerk had become confused in some previous deposition as to whether the date was July 21 or July 22 that the affidavit was filed. But it is sufficient to state that on trial he did not give any testimony that July 21 was not the correct date. The

so-called warrant book (not an official book) shows "an" affidavit to have been filed at 8:20 A. M. July 22, 1913.

The clerk, however, in this case does not undertake to state that July 21 is not the correct date. The presumption must be that the filing date on the affidavit is correct in the absence of evidence to the contrary, and there is none. A record, not official, will not dispute the filing date which is the original. At any rate, even if there is ground for dispute, it is immaterial because the affidavit was on file prior to the publication of the article.

I do not care what the contention is, my judgment is that prior to this publication there was an affidavit filed and a warrant issued, and that fact is established beyond dispute. There must be sufficient evidence shown to warrant a court in disregarding the actual date of filing appearing upon documents, and my judgment is that whether you consider the date as the twenty-first, or the date as the twenty-second, there was a case pending in the police court of the city of Columbus, Ohio, entitled the *State of Ohio v. Samuel Heimlich*, prior to the time of the publication complained of on the twenty-second.

It has been held by the courts of this state that when an affidavit is filed and a warrant issued in the police court of a city, the jurisdiction of that court at once attaches. That case was pending at the time of this publication and it is still pending. The evidence fails to disclose that it ever had been dismissed. The memorandum which is made on the so-called warrant book that the affidavit had been withdrawn is wholly ineffective for any purpose whatsoever. The only way that case could or can be discontinued is by some order made by the court, and there is no evidence of any such order.

That would be like the case of *King v. Penn*, where the pleading was lost in a drawer and remained there for some time. Yet it was considered as filed, as of the date when lodged with the clerk. The matter of the filing of a case is an act and not a record. The memorandum in the record is, of course, evidence of the act. That is the rule that was adopted in *King v. Penn*, so that whatever view counsel may take of the matter,

1916.]

Heimlich v. Dispatch Prtg. Co.

my conclusion is that there was a pending case at the time of this publication and the case that is involved in the first cause of action was one that was then pending, because the date on the affidavit is the only official act shown in evidence, and it is not contradicted.

Now the state extends the privilege both to the pendency of a case and to the filing of an affidavit, and to the issuance of a warrant, but as I have stated, the courts have held that the filing of an affidavit and the issuance of a warrant is what gives jurisdiction and what makes a case pending.

I will analyze this article for a moment to show what I have in mind. The publication states that as the result of the investigation made by D. W. Yapple, at Chillicothe, into a referendum petition filed from that place, a warrant was sworn out Monday evening for the arrest of Samuel Heimlich, an attorney of Cleveland, who circulated petitions there, charging him with perjury. Now to that extent I think every one will admit that that on its face purports to be a report of a case pending in the police court. The next paragraph is to the effect that the perjury consisted of swearing that the name of B. F. Butler on the petition that he filed was genuine. Then it says: "It is declared by Butler to be a forgery." In other words, the publication undertakes to state what Butler claims with reference to the appearance of his name on the petition, which is to the effect that Butler declares it to be a forgery. There is some question that may be raised with reference to whether that is within the meaning of the statutes as a fair and impartial report of the filing of an affidavit and the issuance of the warrant, or whether it is an "addition." It might be a report of a fact obtained from the Governor's or Attorney-General's office. This seems the more likely. But this is for the jury.

The statement "The perjury consisted of swearing that the name of B. F. Butler on a petition that he filed was genuine," of course, may reasonably be considered as being a report of the contents of the affidavit, but when you come to the expression "It is declared by Butler to be a forgery," we have a different question. On reading the affidavit you will find that the allega-

tion is made that this plaintiff made an affidavit that the names of all persons on that petition were their genuine signatures, and then it made the statement that the name of B. F.—of course meaning Hunter—that B. F. Butler's name was not a genuine signature. Now a true and strict report would have given more nearly an exact account of what the affidavit stated, but when you say that it is declared by Butler to be a forgery, that on its face might bear the inference or warrant the claim that it was undertaking to say something that Butler had said somewhere or at some other place, and that, coupled with the mistake in the use of the name—suing B. F. Butler instead of giving the true name, is regarded by the court as some evidence that in my judgment warrants the submission of that question to the jury. There is in fact an apparent mistake in stating the name of the person whose name was obtained on the referendum petition. It was B. F. Hunter, senior, and not B. F. Butler. Butler was the name of the notary before whom the affidavit was taken. This might be claimed to be an immaterial mistake, or one not materially affecting the substance of the charge of perjury or forgery. No explanation of it is made in the evidence. It could have occurred by confusing the name of the notary whose name was signed to the affidavit to a referendum petition. It is considered that a mere mistake innocently made through excusable inadvertance can not in any case be evidence of malice. Newell, L. & S., Section 398. The materiality of the error will be submitted to the jury.

Whether it shall be concluded in this case that this apparent error should be evidence of express malice is deemed to be more appropriately submitted to the jury for its decision. (Newell, p. 398 and case cited.) Now the privilege claimed in this case, as stated before, is both a report of the proceedings before the Governor and Attorney-General as well as this affidavit and warrant in police court. It might be claimed with reason that the author of this article might have obtained from other sources what Butler or Hunter claimed. Express malice, in a case against a corporation, may be shown by gross carelessness or by acts in utter disregard of the rights of another, a

1916.]

Helmlich v. Dispatch Prtg. Co.

wrongful act intentionally done, and my judgment is that on that one point alone this first cause of action should go to the jury.

If the facts are in dispute touching the existence of express malice, or if the facts relating to the fairness or impartiality of the report be controverted, the ultimate facts of privilege is for the jury to determine, or if there is some evidence tending to show inaccuracy or partiality, then the question may appropriately be submitted to the jury.

It must be kept in mind too that the mere falsity of the libel is not alone sufficient evidence to show express malice, or to destroy the privilege. It is essential to show knowledge of the falsity of the libel on the part of the defendant in order to show express malice. *Laing v. Nelson*, 40 Neb., 252; *Ashcraft v. Hammond*, 197 N. Y., 488; *Hume v. Kusche*, 42 Misc., 414; *Atwater v. News Co.*, 67 Conn., 504, 519; *Edwards v. Chandler*, 14 Mich., 471; *Newell L. & S.*, p. 398, notes 32 and 33.

Express malice may be actual hatred or individual spite or malevolence as between individuals, but in such case as this, express malice must be shown, not like that between individuals, but it may be shown by evidence of a wrongful act intentionally done, without cause or excuse, as where a publication clearly appears to have been made with reckless disregard to the rights of another or where there has been gross carelessness. A proper conception of malice is that it has reference not to intention, but to motive, and in almost all legal inquiries intention as distinguished from motive is the important matter.

In making a fair and impartial report of a privileged proceeding, the rule is that the publisher himself must add nothing of his own (*Newell*, Section 663). The statement "It is declared by Butler to be a forgery" might be an inference drawn from the affidavit which charged that one of the signatures on the referendum petition to which the alleged fake affidavit was attached, purported to be the name of one B. F. Hunter, senior (Butler), and purported to have been signed thereto on June 9, 1913, whereas in truth and in fact the signature so attached to the petition was not the genuine signature of the said B. F.

Hunter, nor did the said B. F. Hunter, senior (Butler), sign the petition. If the statement that Butler (Hunter) declared the signature to be a forgery be considered as part of the report on the affidavit, opinion might differ concerning whether the inference was proper and justifiable. If it be considered unjustifiable, then consideration should be given this paragraph as being part of a report of proceedings before the Governor or Attorney-General and whether information was obtained by the reporter from either one of these sources to the fact that Hunter (Butler) was claiming that he did not sign his name to the petition. Mr. Galbraith testified that he secured his information from those offices. His recollections are not clear and distinct concerning the portion of the article, nor as to the sources of the information. It might have been possible that Mr. Galbraith obtained all his information from either the Attorney-General's office or the Governor's office, by either seeing the affidavit there or a copy of it, or from statements made by officials in those offices claiming to have knowledge of the facts. But it is an undisputed fact that an affidavit had then been filed in police court.

Now counsel on behalf of the defendant have strongly urged that there is no evidence of express malice, and as long as the privileged occasion exists and if the court holds as matter of law and the fact that there was and is a privilege, then there is no malice shown. It is a hard problem to decide. I have carefully considered the evidence, and I have given heed to the arguments of counsel for plaintiff in the contentions that are made with reference to these articles. One point is made that the association of Heimlich in the article of the twenty-second with other frauds on initiative and referendum petitions, is to be regarded as evidence of some malice. That is the one this cause of action is drawn from. My judgment is that the article does not bear out the contention of counsel for plaintiff. Of course the general subject of referendum petitions on any laws, or the two or three propositions that were before the people, might be considered as one subject-matter for a newspaper to incorporate into one article, and still the head line here "Hunt evidence of

1916.]

Heimlich v. Dispatch Prtg. Co.

fraud in libel law petitions" is to be taken into consideration with the article itself, and if you will read that part of it which relates to "libel law petitions" I do not think by any stretch of the mind you can link that with the article that is below. But the question of malice will be submitted to the jury.

My judgment is that the article itself does not disclose on its face any knowledge on the part of the defendant of any connection with Heimlich. In making a fair and impartial report of a privileged proceeding, the rule is that the publisher must add nothing of his own. I make that statement because it is relevant to this first cause of action, and the court will charge the jury with reference to that matter.

There is another reason that prompts the court to overrule this motion. The state of the evidence is such that the court deems it proper, safe and wise to submit the question of fact as to whether or not the publication was a privileged one within the law, which the court will lay down, to the jury. It seems to me that under all the circumstances, it is more within the province of the jury to find where this information came from, who obtained it and how it was obtained and with what care it was obtained. The question of the function of the court and jury thus presented, is a delicate and important one. There is no duty of the court in the matter of construing the meaning of the libelous article because the question whether the affidavit fully justified the statement that Butler claimed the signature to be a forgery is not within the pale of construction. And the article needs no construction by the court because the charge of perjury and of forgery stand out clear and distinct. It is considered that it is for the jury to decide from what sources the defendant obtained the information for this article, whether from the Attorney-General's office, or the Governor's office, or from the police court. The nature of the evidence concerning this matter, together with the one paragraph as to the statement as to the claim of Butler and the mistake in the name altogether considered, seem sufficient reason why the question should go to the jury. The function of the court in such case then is to give the law as to the occasion of the

privilege, and that of the jury to determine whether the facts bring the case within the occasion. A presumption in favor of the defendant arises from the privileged occasion which remains until it is rebutted by evidence of malice. Only so much of the article as is contained in the issue of the paper in which the portion complained of in the first cause of action as relates to the referendum on the workmen's compensation law, can be considered, because there is no evidence that shows that defendants had any connection with the newspaper bill. The plaintiff can not recover, therefore, unless the evidence offered shows express malice, and the obligation rests upon the plaintiff to prove such malice. What evidence is there then to show express malice? As to the first cause of action, there is nothing unless it be the statement in the publication that it is declared by Butler that this signature to the petition is a forgery. There is no evidence that Butler or Hunter made such claim, nor is there any evidence specifically showing that this fact was one obtained from those officers making the investigation. Galbraith's testimony is not clear on that point. Whether this shows the report to be fair and impartial seems more within the function of the jury to decide, especially in view of the mistake in the use of the name Butler instead of Hunter. Whether there was such gross carelessness, either in obtaining the facts or in correctly reporting the same as tends to show express malice on the part of the defendant so as to make the defendant liable, notwithstanding the privileged occasion, is deemed by the court more appropriately a question for the jury. Furthermore, in view of the evidence relating to obtaining the facts stated in the article, it is considered by the court a safer course to submit the ultimate facts of who and how the information was obtained, whether from sources which rendered the report privileged, as well as the decision whether it was fair and impartial. Therefore, as I say, the motion as to the first cause of action is overruled.

Now with reference to the second cause of action, that is a publication in connection with the statement of the alleged withdrawal of the former affidavit and is, "The Attorney-Gen-

1916.]

Heimlich v. Dispatch Prtg. Co.

eral's office, however, expects to file another warrant against Heimlich based upon other evidence of alleged fraud in connection with the same law." The privilege claimed for that cause of action is that it is a fair and impartial report of proceedings that were had before the Attorney-General and the Governor. I have gone over the evidence bearing upon the source of knowledge of the alleged facts and the evidence touching the preparation of that article, and my judgment is that the evidence bearing upon that is of such character that it is prudent and wise for the court to submit it to the judgment of the jury. This publication by *innuendo* charges Heimlich with the commission of fraud, and being an attorney, in the absence of truth or privilege, is libelous *per se*. The evidence discloses that this information came from reports of proceedings before state officers. There is another proposition, however, that stands out paramount in my mind. The plaintiff, by the course of his evidence, has made the falsity and truth of the charge of fraud contained in that publication an issue. The court might possibly be warranted in taking the view that the evidence now offered, in so far as concerns the admissions of the plaintiff, shows that he was directly and proximately the cause of whatever fraud there was committed in the filing of the petition containing the name of Harry Walker. I have read his testimony and it is evasive, unsatisfactory and calls for judgment upon its credibility, which is not the function of the court. Whatever opinion the court might have about it, would matter not. It seems clear to my mind, however, that his admission that he had left this petition signed by him for the purpose which he states—as to identifying the petitions gotten by him—with those authorized to receive them, would render him liable for whatever consequences resulted therefrom. By his own act he made it possible to have the paper writing signed up and filed and he should be held responsible therefor. But to my mind, it would not be the cautious and safe method for the court to undertake to assume any duty with reference to that matter under all the circumstances. The issue is clearly and sharply drawn as to whether or not the

plaintiff did commit a fraud. He has given his version of the matter with reference to swearing to the affidavit. The notary has stated in a pretty clear way that he felt sure there were only three affidavits to which he had not formally administered the oath and that Heimlich's was not one of those three. The whole testimony of the plaintiff with reference to that matter as well as with reference to the matter of making demands upon Mr. Butler, show his motive, and which in my judgment is relevant as bearing upon the question of credibility—makes it especially a case that ought to go to the jury.

As to the last cause of action. "McMillan is attorney for Heimlich, of Cleveland, who is now charged with perjury." There could be no possible claim in my judgment that that is not a fair and impartial report of a fact, that Heimlich was at that time charged with perjury. The second affidavit was on file. The court would have to say that it was an absolute privileged publication under all the circumstances, and the only way that the plaintiff could counteract that would be to show express malice with reference to that publication, and in my judgment there is not a shadow of evidence that would bear upon express malice or tend to show express malice as to the publication. The one newspaper article that was introduced about the announcement of Samuel Heimlich from Cleveland that he was going to bring certain prosecutions, in my mind does not tend in the slightest degree to show any malice.

Therefore, the conclusion of the court is that the motion of the defendant as to the first and second causes of action is overruled, and as to the third cause of action it is sustained.

1916.]

Berry v. Berry.

**FAILURE TO PROVIDE NOT ALONE GROUND FOR
DIVORCE.**

Common Pleas Court of Hamilton County.

GLADYS LA F. BERRY v. EDWARD M. BERRY.

Decided, February 2, 1915.

Divorce and Alimony—Gross Neglect of Duty Not Shown by Mere Failure to Provide—Nor by Mere Absence—Indignity, Aggravation or Insult to Wife Not a Consequence of Husband's Refusal to Work.

Mere failure to provide does not constitute ground for divorce in this state, where not accompanied by such circumstances of aggravation or indignity as would warrant it being termed gross neglect of duty.

Charles L. Hopping, for plaintiff.

John W. Weinig, contra.

HOFFMAN (C. W.), J.

This is an action for divorce. Plaintiff and defendant were married on the thirtieth day of March, 1912. No children were born as an issue of said marriage. The petition contains the following allegations:

"For a cause of action plaintiff says that the defendant has been guilty of gross neglect of his duty toward her as his wife, he having failed, refused and neglected, without any reasonable or proper cause, to so exert himself and employ his time in such manner as was necessary to earn sufficient money to provide her and their home with the common necessities of life and comfort, although he has been physically able at all times since their marriage so to do.

"Plaintiff says that because of the defendant's reckless, careless and dilatory habits of life she has been dependent upon her own efforts and the charity of her mother and her friends for food, clothing and shelter, the defendant being so careless and neglectful of his marital duties as to cause their eviction from their place of abode and to permit and suffer the loss of their household furniture and small belongings.

“Plaintiff says that by reason of said defendant’s failure to properly provide for her, she has been greatly humiliated and has been compelled to separate herself from him.”

The evidence discloses that the defendant is twenty-three years of age, and that the plaintiff was separated from him for seven months previous to the filing of the petition. The plaintiff says that she separated from him because “he would not work and provide for her.” For six months previous to the separation defendant was employed by an express company. Plaintiff says that he lost his position “through talking too much,” and that this caused her to go back to her mother. The plaintiff, when asked as to the habits of her husband, replied that he simply would not work or provide for her, and that he did not care to work. Defendant has contributed nothing toward the support or maintenance of plaintiff during the seven months of their separation. The plaintiff is now living with her mother, and says that she is paying her mother for boarding her.

There is no evidence to the effect that plaintiff was humiliated, other than that she was humiliated because her husband did not provide for her support and maintenance. Evidence was introduced showing that defendant was able to work and properly support his wife.

Whatever may be the philosophy upon which individual ideas concerning marriage and divorce are based, it is certain that the state, expressing itself by means of laws enacted by the General Assembly, has not deemed it wise to make “failure to provide” a cause for divorce. It is the function of the state and not that of the courts to determine the causes for which a divorce may be granted. The judge may refuse to grant a divorce even though the evidence sustains one of the causes mentioned in the statute; on the other hand, the court is without jurisdiction to grant a divorce unless the allegations of the petition and the evidence shows that a cause of action under one or more of the causes for divorce named in the statute.

It is provided in Section 11979 of the General Code that one of the causes for which a divorce may be granted is “any gross neglect of duty.”

1916.]

Berry v. Berry.

To hold that there is no distinction between "failure to provide" and "gross neglect of duty" would be not only misinterpreting the law, but would amount to permitting, practically, voluntary separation. In a case in which the facts were not so strong as in the present case Judge Avery says that "To hold that a cause of divorce is made out upon the evidence would be straining the law, nay, more, would be openly misinterpreting it. Gross neglect of duty, as must so often be repeated, is not mere failure to provide." *Nichols v. Nichols*, 8 W. L. B., 88.

In construing the divorce laws, confusion has often arisen in the failure to distinguish willful absence from gross neglect of duty. One of the parties may be willfully absent, and this may amount to a total failure to provide. A divorce could not be granted in this instance, unless the absence was for three years. If a total failure to provide were construed as meaning gross neglect, there would be little necessity for making absence a ground for divorce. In the case of *Nichols v. Nichols*, 8 W. L. B., 88, above mentioned, Judge Avery in this connection says:

"Whatever uncertainty may attend the definition of gross neglect of duty, it is certain that it does not consist in a husband's merely absenting himself from his wife, without afterward receiving any support from him. Not that this might not be a neglect of his duty to cleave to her, and in ordinary language gross neglect. But in classifying the ground for divorce, 'willful absence' is assigned as a separate cause, and what is a part of, or consequence of willful absence belongs to that head and not the head of 'gross neglect of duty.' Willful absence may include not only withdrawal of the presence of the husband, but of all communication with, or provision by him; the one is a part of, or a consequence of the other. It does not become more than willful absence, because meanwhile nothing has been contributed to the wife's support. The law of divorce has certainly not been left by the Legislature in such a state, that it may be made to adjust itself to whatever is named, in the complaint for divorce as the cause; and that part of a cause, under one head, will become full cause under another."

In the *Nichols* case the mother of the wife testified that the defendant "was a very nice man, not cross or anything, only not feeling obliged to work."

In the case at bar the mother of the plaintiff, when asked as to the conduct of the defendant toward her daughter during their married life, said: "The only thing with him, he absolutely refused to work. He said he did not intend to support any woman, and in their married life, I had to support them." She further said, when asked if she knew of any reason why the parties should not have gotten along, that she knew of no reason at all if the defendant would only have worked.

The word "gross" in the phrase "gross neglect of duty" is not merely superfluous. It is significant of the character of the neglect of duty that warrants a divorce. It does not mean a partial or a total neglect of duty; it is more than either of these facts.

"The term 'gross' used in the statute in describing the kind of neglect of duty which makes a cause of action, was intended to express something; this is not a redundant word; it means gross neglect, not mere neglect or partial neglect or even total neglect of duty. It means more than either of these conditions of fact. This has been decided so often that it is almost a work of supererogation to decide again." *In re Gross Neglect*, 8 O. D., 701.

Failure to provide may be one of the facts that enter into gross neglect of duty. The petition then must allege and the evidence prove, not only failure to provide, but accompanying circumstances of indignity, aggravation or insult. These circumstances, it will be observed, are something more than the circumstances usually incident to the failure to provide.

"To constitute gross neglect of duty there must not only be a default, but default must be attended with circumstances of indignity and aggravation." *Tibergheim v. Tibergheim*, 8 W. L. B., 89.

"Total failure to provide accompanied by absence of complainant but not accompanied by circumstances of indignity, aggravation or insult can only constitute a cause of action when it has continued for three years and then it is willful desertion." *In re Gross Neglect*, 8 O. D., 701.

1916.]

Berry v. Berry.

“The expression ‘gross neglect of duty’ is indefinite, and it is difficult to lay down any general rule by which every case can be determined to be within or without its limits. That each case must be examined by itself and yet an examination of the whole body of the divorce act will suggest certain things as to the legislative intent of this expression. And, first, it is not mere neglect of marital duty. The adjective ‘gross,’ whatever may be said of it as a mere term of vituperation in other relations, here has legal force as descriptive of the conduct of the party neglecting duty. If it were not so, and any mere neglect of duty were ground for divorce, the aid of the courts might as well be abandoned and voluntary separation permitted. There must not only be a default, but the default must be attended with circumstances of indignity or aggravation.” *Smith v. Smith*, 22 Kans., 699.

As conceived by the court it is the policy of this state, as evidenced by its divorce laws, to discourage hasty separation for trivial causes. A divorce can not be granted within less than six weeks from the time of the filing of the petition; willful absence must be for three years; non-support unaccompanied by circumstances of aggravation is not a cause for legal separation. The door of hope is held open for a time in order that a reconciliation may be effected and happiness again enter the home. The state affords the parties the opportunity to reflect and, possibly, to finally recognize the inexorable demands of marriage “for patience and self-control, for loyalty through sorrow and sickness, through misfortune and aging years.” Thus, in a measure, the welfare of the individual and the security of the family and the state may be maintained.

In the case at bar the court does not find that the failure to provide on the part of the defendant has been accompanied by such circumstances of aggravation or indignity as would warrant its being termed “gross neglect of duty.”

The petition is therefore dismissed.

**ACCEPTANCE OF AN AWARD FROM THE STATE INSURANCE
FUND DOES NOT BAR AN ACTION AGAINST
THE TORT FEASOR.**

Superior Court of Cincinnati.

MATHILDA H. KENNING, ADMINISTRATRIX, v. INTERURBAN RAIL-
WAY & TERMINAL CO.

Decided, November 30, 1915.

Funds Awarded by the Industrial Commission—In the Nature of an Occupation Tax upon Employers—Compensation under the Ohio Act and Damages under the Common Law Distinguished—Acceptance of an Award by the Industrial Commission and Recovery from the Negligent Tort-Feasor Not a Double Recovery for a Single Wrong.

When a workman has been killed by the actionable negligence of a third person, the fact that his personal representative has already received payment from the state insurance fund under the workmen's compensation act will not prevent such representative from maintaining an action against the tort-feasor for damages for causing the death. Nor will the fact that the tort-feasor himself also contributes to the state fund affect his liability.

*Thornton R. Snyder and Horstman & Horstman, for plaintiff.
Dinsmore & Shohl, contra.*

OPPENHEIMER, J.

Plaintiff's intestate, an employee of the Fairmount Brewing Company, was driving one of its wagons upon a street over which defendant's cars were being operated. The wagon was struck by a car and he was killed. The petition alleges that the collision was caused solely by the negligence of defendant's servants.

The third defense of the answer, to which a demurrer has been filed, alleges that subsequent to the death of plaintiff's intestate, the widow filed an application with the industrial commission, and that an award of \$3,744, together with certain sums for funeral and other expenses, was made to her for the benefit

1916.]

Kenning, Admr., v. Ry. Co.

of decedent's family. It is further alleged in the same defense that at the time of such payment defendant was also a contributor to the state insurance fund, and that it therefore had a direct pecuniary interest in the fund out of which the aforementioned sums were paid.

The several workmen's compensation acts are of very recent passage, and there has therefore been given but little opportunity for interpretation by courts of last resort. In this state a careful search has revealed but two decisions which directly involve the question now before us, and they are decisions of nisi prius courts and are unfortunately irreconcilable. But we think that the solution of the question now presented is not attended with any particular difficulty.

All so-called workmen's compensation, for which provision is made in such statutes as ours, is merely a species of social insurance. The term "compensation" is in reality a misnomer. It is not even designed to compensate the injured workman for his mental or physical suffering, for the impairment of his future earning capacity, or for many of the other things which might properly be considered by a jury in the award of compensatory damages against a tort-feasor. Indeed, the Ohio act expressly disavows any claim that the sums paid by virtue of its provisions shall be full compensation. It does not provide compensation for the first week of disability (Section 1465-78, General Code); it does not cover any medical expenses in excess of \$200 (Section 1465-89); it provides payment after the first week for a limited period of time to the extent of only two-thirds of the injured workman's earning capacity (Section 1465-80). Its manifest purpose is to secure to the employee a prompt, certain and non-litigious pecuniary relief from the hardships attendant upon injury suffered in the course of his employment. The old theory of the law was that an injured employee might recover from an employer who was guilty of actual or imputed negligence, provided he himself was not negligent and had not assumed the risk of suffering such injury. The new theory of the law is that there should be at least a partial indemnity wherever the casualty is incident to the employment—unless the

casualty is the result of the wilful act of the injured employee. The old theory was a by-product of the erroneous economic assumption that the wages of the workman were measurably determined by the dangers attendant upon the employment, so that the public ultimately bore, by way of increased price of the things produced by him, the burden which primarily rested upon the employee. The new theory emanates from a more consistent economic view that it is proper for the industry itself, as a part of the cost of production, to furnish relief to the incapacitated servant and to assume the burden of all industrial casualty to its employees. Indeed, it is now generally recognized that industrial risks are necessary accompaniments and incidental expenses of all industrial enterprises.

As already indicated, the injured employee's right to such payment is not dependent upon his want of fault or upon his employer's negligence. If the injury is suffered in the course of the employment and is not wilfully self-inflicted, payment must be made. In this respect it is simply insurance paid out of the fund created in whole or in part by the employer. The first Ohio act (102 O. L., 524-533) expressly stated (Section 18) that "the State Liability Board of Awards shall establish a state *insurance fund* from premiums paid thereto * * * as herein provided." The present act (103 O. L., 95) creates an industrial commission for the purpose of administering this "insurance fund." As has been said of the English act (1897, 60 and 61 Vict., ch. 37), which is the prototype of our act, "the principle underlying the act imports into British law the novel doctrine that an employer of labor, apart from personal or constructive negligence, is a *compulsory insurer*, against accident, of the workmen employed by him." Clerk & Lindsell, Torts, 4 Ed., 98. See also Dicey, Law and Pub. Opinion in Eng., 281, 283.

We have employed the word "indemnity" as measurably definitive of the amount paid to an injured workman. Even this term is not strictly accurate, for the fact that the amount to be paid under the act is determined according to an arbitrary scale and that only partial wages are paid during incapacity, strength-

1916.]

Kenning, Admr., v. Ry. Co.

ened by the analogy to life and accident insurance, would indicate that the payment is rather in the nature of a bonus than of an indemnity. XXVII H. L. R., 307-8. Therefore no remedy by subrogation can be given, unless such remedy is expressly created by statute. *Interstate Telephone Company v. Public Service Electric Co.*, 90 Atl. (N. J.), 1062.

The validity of defendant's claim depends, of course, entirely upon his thesis that there can be only one recovery for the alleged tort—that when settlement has been made with one of two joint or *quasi* joint tort feasons, the other is discharged from all liability. Unfortunately for defendant's position, however, this contention begs the very question at issue. Decedent's employer and the defendant were not joint tort feasons. The law required the employer to maintain insurance for decedent's benefit. With this insurance defendant had absolutely nothing to do. It was paid to the decedent's dependents solely because he met his death in the course of the employment, which was the risk insured against. The employer was guilty of no tort, and plaintiff, to justify her claim under the compensation act, was not required to make any of the allegations which usually characterize and are essential to a claim in tort. She did not have to allege or prove negligence on the part of her decedent's employer, nor could payment be avoided by anything short of proof that the injury which caused the death was "purposely self-inflicted" (Section 1465-68). Full monetary compensation could not be recovered, nor was there any pretense that the amount actually paid covered the pecuniary loss suffered by the dependents of the decedent. The duty to make payment arose entirely outside of the law of torts. It was rather a legal obligation arising out of the contract of service (*Interstate Telephone Company v. Public Service Electric Company, supra*). The sum so paid bore no resemblance in any of its essential features to damages, and the right to recover can not be tested by any tort analogies.

Indeed, it has been cogently contended by many authorities that such statutes as ours are not even an exercise of the general police power, but of the taxing power; that they have nothing to

do with the enforcement of a claim arising out of an actionable wrong, but rather "are the imposition of an occupation tax upon employers * * *; the sums levied constituting a fund for the relief of workmen who have been harmed in the conduct of the business." *Cunningham v. Northwestern, etc., Co.*, 44 Mont., 180, 209, 213; *Boyd, Workmen's Compensation*, Sections 67, 70, 75, 83, 87, 88, 91; XXVII H. L. R., 235, 245; 59 Pa. L. R., 287, 288, 291, 293-7; 10 Mich. L. R., 438-9.

It is quite apparent in any event, that such acts have departed completely from the fundamental principles of the modern law of torts. They present a "distinct revulsion from the conception that fault is essential to liability," and a "reversion to the earlier conception that he who causes harm, however innocently, is, as its author, bound to make it good." They hark back to the ancient doctrine that it was enough if defendant's act occasioned plaintiff's damages, though the act itself might have been entirely blameless. XXII H. L. R., 99; 59 Pa. L. R., 450, 451; Pollock & Maitland, *Hist. Eng. Law*, 2d Ed., 54.

There seems to us to be no reason for any misunderstanding concerning the purpose of the Legislature in the adoption of the Ohio law. The distinction between "compensation" under the act and damages in an action under the common law, is recognized and preserved (Sections 1465-76, 1465-92). Indeed, the latter section (Section 45 of the act of 1913) is most significant in that it states that "no provision of this act relating to the amount of compensation shall be considered by, or called to the attention of, the jury on the trial of any action to recover damages as herein provided." There could be no clearer manifestation of an intention to distinguish between compensation and damages than is found in this section. But even if the employer had been guilty of a tort, yet the payment of insurance of any kind—including state industrial insurance—would not, it seems to us, avail a third person who is guilty of negligence proximately causing a mishap (13 Cyc., 70-71; *Trefts v. Excise Commissioners*, 73 N. J. L., 278; *Hammond v. Schiff*, 100 N. C., 161). As a matter of fact, nothing whatever was received directly from decedent's employer. Payment was made out of the

1916.]

Kenning, Admr., v. Ry. Co.

state fund, with the distribution of which, as well as with the amount paid in this particular case, the employer had nothing to do. His sole duty was the payment of the assessments which were required of him by the industrial commission, and the amount of these assessments was not dependent upon the number of claims arising out of mishaps to his own employees, but upon the number of mishaps in that particular branch of industry at large.

Defendant, however, while admitting that it could not avail itself of the insurance if it were the employee who was insured, contends that in reality it is the employer who is insured. We can not follow the defendant to this conclusion. As well might you designate as the "assured" one of a number of underwriters of a given risk, merely because the fund created by the general contributions of himself and his associates was designed to protect him from personal liability to any individual claimant. The "assured" is simply the person to whom the stipulated payments are to be made in case of the happening of the given event. In the instant case, this person is the employee and not the employer. And defendant's counsel, in their able brief, admit that if it is the employee who is the assured, a third person can not avail himself of that independent contract of insurance.

Nor can we concede that defendant itself has paid premiums into the fund out of which compensation was made to plaintiff and that it "therefore had a direct and pecuniary interest in the fund." While the state insurance fund is indeed an entirety, and while it is made up of numerous premiums paid by employers of every class, yet the rate of premium paid by each contributor depends upon the risk of injury in the class to which he belongs. The avowed purpose is to maintain a solvent fund for each class of occupation—to make each class self-supporting, as it were (Section 1465-54). Defendant quotes at length clause 4 of Section 7 of our workmen's compensation act; but we think that this section is rather corroborative of our view than of defendant's contention. It shows distinctly that an accounting is to be made by the industrial commission for the purpose of determining whether any balance remains to the credit "of *any class of occupation or industry*" after disbursements

have been made on account of injuries or death to employees *in that specific class*, and for a readjustment of rates to be paid by the employers *in that class*. Manifestly defendant had nothing to do with the rates to be charged plaintiff's employer, nor was the reverse in any sense true. However, we are of opinion that defendant's position would be untenable even if they were in the same class, for we can find in our act no evidence of an attempt in any way to abridge the remedies which an injured employee of one person may have at law against a third person for a tort which such third person commits against him. *Smale v. Mfg. Co.*, 160 Wis., 331.

Not only do principle and logic constrain us to sustain plaintiff's demurrer, but authority, however limited, seems likewise to favor this view. Thus in the recent case of *Jacowicz v. Ry. Co.*, 92 Atl. (N. J.), 946, an injured employee received compensation from a non-negligent employer, under an act similar in all its essential features to ours, and gave him a general release; yet he was permitted to recover from a third person whose negligence had directly caused his injury.

So it has been held that a release of a negligent third person who has caused an injury will not exonerate an employer from the payment of compensation provided for in the act in the absence of special statutory provisions as to subrogation. *Paving Co. v. Klotz*, 85 N. J. L., 432; *Perlsburg v. Muller*, 35 N. J. L., 299. While this is the converse of our proposition, it involves an unequivocal recognition of the basic principle thereof, viz., that compensation under the statute and damages are distinct and separate things.

The same conclusion has been reached by the industrial commission of this state in the recent case of *Ridorfo v. Telephone Company*, 1 Dept. Rep., Ohio, 836, and *Ferraro v. Iron Works*, 13 O. L. R., 439 (November 8, 1915). In the former case the commission says through its chairman:

"The necessary conclusion to be drawn from the foregoing is, it seems to us, that an employee, under the terms of the workmen's compensation act, may be injured under such circumstances as to receive compensation from his employer and at

1916.]

Kenning, Admr., v. Ry. Co.

the same time to be entitled to recover damages from some other person or corporation."

Accordingly the commission permitted the claimant to recover from the employer, though he had already made settlement with a third person whose negligence directly caused the injury of which he complained.

The question here presented for our discussion was directly raised in the recent case of *Biddinger v. Steininger-Taylor Co.*, 18 N.P.(N.S.), 42. Strangely enough, the question is there raised in precisely the same manner as in the case at bar—by demurrer to a separate defense of the answer, which contained also the allegation that the defendant was a contributor to the state fund. The syllabus reads:

"An employee who has been injured or the personal representative of an employee who has been killed in the course of his employment, after having applied for and received an award under the workmen's compensation law, and after such award has been paid in full, may maintain an action against a stranger for damages for negligently causing the same personal injury."

Interesting articles bearing upon this question, and supporting our view, may also be found in 13 O. L. R., 7 (April 5, 1915); XXVI H. L. R., 377; XXVIII H. L. R., 713.

It is interesting to observe that in some states the compensation acts themselves expressly distinguish between the employer who is required to pay the injured employee and a third person whose negligence has caused the injury, and provide that an employer who pays the compensation under the act shall have a right over against the real tort feisor, to the extent of his payment. This provision manifestly negatives any idea that they are joint tort feisors, and is found absolutely or with some qualification in the acts of California, Connecticut, Illinois, Iowa, Kansas, Nebraska, Nevada, New Jersey, Rhode Island, Wisconsin, New York, Oregon and Washington. In England this is also true (Act 60 and 61 Vict., C. 37, Section 6), but the question now presented to us can not there arise because of express provision that "workmen * * * shall not be entitled to recover both damage and compensation."

An opinion contrary to ours has been rendered in the recent case of *Noonan v. Cleveland Forge & Iron Co.*, Cuyahoga Common Pleas No. 136466 (not reported). Our only comment upon that case is that it seems to proceed entirely upon the theory that a recovery against a third person after the payment of compensation under the act would be violative of the legal principle that there can be but one recovery for a single wrong. We think that this position is entirely untenable; and though we have a high regard for the opinions of the judge who decided that case, we do not feel constrained to follow him blindly.

We are of opinion that the demurrer to the third defense of the answer should be sustained.

NO CLAIM FOR WRONGFUL EVICTION.

Common Pleas Court of Hamilton County.

GEORGE BIELER SONS CO. V. ANTHONY G. RIST.

Decided, March, 1916.

Landlord and Tenant—No Liability in Tort for Damages—Where Premises Are Surrendered After Judgment of Eviction.

A tenant who surrendered possession of premises after a judgment of eviction had been rendered against him by a magistrate has no claim against the landlord in tort for damages because of an unjustifiable eviction.

Peck, Shaffer & Peck, for plaintiff.

Cogan, Williams & Ragland and *Horace A. Reeve*, contra.

MAY, J.

This cause was submitted on a motion to strike out certain allegations of the cross-petition of the defendant.

Prior to the proceedings herein the plaintiff and the defendant were lessor and lessee respectively under a lease. The plaintiff gave the defendant written notice to leave the premises, and following the refusal of the defendant to vacate brought

1916.]

Hamilton County.

an action in forcible entry and detainer before James D. Templeton, justice of the peace, and upon the trial of said cause the plaintiff obtained a judgment of restitution, and in pursuance thereof the defendant left and vacated the premises. The plaintiff then brought this suit to recover damages sustained by it during the occupancy of the premises by the defendant and a second cause of action asks for unpaid rent due under the lease. The defendant's answer sets out certain facts denying any liability for damages and any liability for rent. By his cross-petition, which is part of the answer, he asks for certain damages from the plaintiff based upon his eviction by the plaintiff. The plaintiff moves to strike out all allegations upon which this action of damages is based.

Upon consideration, I am of the opinion that the motion is well taken.

"The tenant's right of action against the landlord in tort is, it seems, similar to that which he would have against any stranger who might similarly interfere with his possession or enjoyment. * * * In other words, * * * the tenant recovers not for an eviction by his landlord, but for a trespass on his possession or for an interference with his rights of enjoyment." 2 *Tiffany, Landl. & Ten.*, p. 1292, Sec. 185.

The same author, at p. 1299, Section 186, states:

"The tenant can not assert an eviction by reason of the fact that he yielded possession to the holder of a paramount title, unless he did this in pursuance of a hostile assertion of such title."

In the case at bar, the defendant in his answer sets out the fact that he was given notice to leave the premises and that on failure to leave the premises a suit in forcible entry and detainer was commenced against him and that a judgment was rendered against him in said suit, and that in pursuance thereof he vacated the premises.

From this state of facts there certainly was no wrongful eviction, and therefore no tort was committed by the landlord;

consequently, no damages for wrongful eviction can be recovered. If the tenant had any right to remain in the premises, it was his duty to defend the action before the justice of the peace.

Conceding, for the purpose of argument, that the judgment in the squire's court was not a justifiable eviction, if the defendant voluntarily left the premises after the rendition of said judgment, then his leaving the premises must be construed as a surrender of the same to the landlord.

At p. 1348, Sec. 191a, 2 *Tiffany, Landl. & Ten.*, it is said:

"A surrender of the tenant has the effect of terminating all his interest under the lease, since the interest is thereby transferred to the landlord. And furthermore, it terminates all future liability under the covenants of the lease."

It is therefore immaterial whether the defendant in this case left because of the judgment or because of the surrender. In neither event can he predicate an action for damages on his leaving the premises under the circumstances set out in his answer.

Counsel for the cross-petitioner cites Section 10450, General Code, reading:

"Judgments under this chapter, either before a justice of the peace or in the court of common pleas, shall not be a bar to a later action brought by either party."

This refers to an action in forcible entry and detainer and can not have any reference at all to a tort growing out of an alleged eviction where it was made in pursuance of the judgment.

For these reasons, the motion to strike out is granted and the defendant given ten days to file an amended answer and cross-petition.

1916.]

Short v. Railway.

**VALIDITY OF CONTRACT FOR FREE TRANSPORTATION IN
EXCHANGE FOR PROPERTY.**

Common Pleas Court of Hamilton County.

**CHARLES W. SHORT v. CLEVELAND, CINCINNATI, CHICAGO &
ST. LOUIS RAILWAY COMPANY.**

Decided, April 19, 1916.

*Contracts—Land Conveyed to Railway Company in Consideration of
Free Transportation—Transportation Withdrawn by the Company
in View of the Provisions of the Hepburn Act—Right of the Land
Owner to Maintain an Action in Ejectment Upheld.*

S in 1887 conveyed to the railway company certain parcels of land for the nominal consideration of one dollar and there was a recital in the deed as follows:

"Provided nevertheless, and this conveyance is upon this express condition, that for and during their natural lives, the said Charles W. Short, his wife and children, all and each shall have free transportation for themselves on any of the trains of said Cincinnati, Indianapolis, St. Louis & Chicago Railway, and all its branches, and that for said Short and his wife and each of them all the passenger trains of said company shall and will when so requested stop at the station at Fern Bank or at any other point on said road or any of its branches where said Short and wife or either of them may at any time be residing or sojourning. The privileges named in this condition constitute the real consideration for this deed, and the acceptance of the deed by said C., I., St. L. & C. Railway Company shall be taken as an agreement by said company to all the terms set forth in said condition; and if at any time said company shall refuse or fail to comply with the terms of said condition, the title to said property, hereby conveyed, shall immediately revert to said Charles W. Short and his heirs, who may re-enter upon and take possession thereof as fully and completely as if this conveyance had not been made, anything herein to the contrary notwithstanding." *Held:*

1. That upon the failure of the railway company to grant the transportation provided for in the condition of the deed, an action in ejectment may be maintained.

2. The defense that the railway company, being unable to comply with the performance of the condition for the giving of free transportation by reason of the fact that under the provisions of the Hepburn act of June 29, 1906 (34 Stat. at L., 587, Chap. 3591, Comp. Stat., 1913, Section 8569), Section 2, the said giving of free transportation is prohibited, the estate becomes absolute in the railway company, will not be available to defeat said action in ejectment.
3. The fact that the statutes of Indiana and the statutes of Ohio prohibit the giving of transportation in the same manner and to the same extent in regard to intrastate journeys as the Hepburn act does in regard to interstate journeys, will not justify the railway company in refusing to grant the transportation provided for in the condition of the deed, in so far as purely intrastate journeys are concerned.
4. Persons making contracts in regard to free transportation that is purely intrastate, in so far as any prohibition subsequently sought to be made by the state or states against such contracts is concerned, have the protection afforded by Article I, Section 10, of the Federal Constitution, providing that no state may pass any law impairing the obligations of contractors, and of Section 1 of the Fourteenth Amendment of the Federal Constitution, providing that no state shall make or enforce any law which shall deprive any person of life, liberty or property without due process of law.
5. There is nothing in the language of the aforesaid condition that compels the court to construe its provisions as entire, and therefore the court will apply the well known principle that where one for a valid consideration agrees to do one or more things, one of which may be illegal, he may, nevertheless, be compelled to do the other or others.
6. If it shall appear that under the court's order of ejectment in such a case the rights of the public are being interfered with, the court will stay proceedings until steps have been taken to preserve the rights of the public.

Worthington, Strong & Stettinius, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly, contra.

GEOGHEGAN, J.

This is an action in ejectment and by agreement of counsel a jury was waived and the matter submitted for the court's final determination.

1916.]

Short v. Railway.

On June 15, 1887, Charles W. Short and Mary D. Short, his wife, conveyed a strip of land to the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company, 13½ feet wide at its narrowest point and 30 feet wide at its broadest point, and extending for a distance of a mile and a half, from the east line of the village of Fern Bank to the east line of the property of the railway company, and in addition certain lots of land in Grayson Square, in the village of North Bend, containing 2.47 acres. The deed was made for the nominal consideration of \$1, and there was a recital in the deed as follows:

“Provided nevertheless, and this conveyance is upon this express condition, that for and during their natural lives, the said Charles W. Short, his wife and children, all and each shall have free transportation for themselves on any of the trains of said Cincinnati, Indianapolis, St. Louis & Chicago Railway, and all its branches, and that for said Short and his wife and each of them all the passenger trains of said company shall and will when so requested stop at the station at Fern Bank or at any other point on said road or any of its branches where said Short and wife or either of them may at any time be residing or sojourning. The privileges named in this condition constitute the real consideration for this deed, and the acceptance of the deed by said C., I., St. L. & C. Railway Company shall be taken as an agreement by said company to all the terms set forth in said condition; and if at any time said company shall refuse or fail to comply with the terms of said condition, the title to said property, hereby conveyed, shall immediately revert to said Charles W. Short and his heirs, who may re-enter upon and take possession thereof as fully and completely as if this conveyance had not been made, anything herein to the contrary notwithstanding.”

At the time this deed was executed Mr. Short had a wife and three sons living. Since that time his wife has died and Mr. Short and his three sons, William A. Dudley Short, John Cleves Short and Charles Wilkins Short, are the beneficiaries of the provisions of the recital in the deed above referred to.

At the time of the grant, the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company was a corporation under the

laws of the state of Indiana, operating a line of railroad from the city of Cincinnati, in the state of Ohio, to the city of Lafayette, in the state of Indiana. Subsequent to the execution of the deed, the said company, together with certain other companies, were, by an agreement of consolidation, merged into one company, known as the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, which is the defendant herein, and by the terms of said agreement of consolidation the said consolidated company agreed to assume and be bound by all the liabilities and obligations of each of the several companies parties to the agreement of consolidation.

Since October 1, 1911, the defendant company has refused to give transportation to the plaintiff or any of his sons on any of the trains operated by the said railway company between any two points reached by said trains. Subsequent to said refusal, and prior to the commencement of this action, the said Charles W. Short made entry upon the lands conveyed by him by the deed hereinbefore mentioned, claiming that the title to the lands had reverted to him by reason of the breach of the condition in said deed, and he now brings this action for the purpose of evicting the said defendant company from its occupation of these said lands.

The defendant claims that he should not succeed in his action because of the fact that the commerce act of Congress, of June 29, 1906, which became effective August 28, 1906, 34 Stats. 838, Pt. 1, Res. 47, prevents it from carrying out the provisions of the condition named in the deed.

Among the provisions contained in that act is the following:

“Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.”

1916.]

Short v. Railway.

The defendant company claims that inasmuch as it is prevented, by the operation of this act, commonly known as the Hepburn act, from receiving a different compensation for transportation of passengers from that contained in the published tariffs, which are provided for in the act, it is justified in refusing to give the transportation provided for as the real consideration for the deed, and further that, its compliance with the condition having been rendered impossible by the act of Congress, the estate conveyed by the deed has become absolute in the defendant company. Counsel cites as authority for this contention the principle that wherever an estate is made to depend upon a condition subsequent and that condition subsequent becomes impossible of performance by act of law, the estate in the grantee becomes absolute. 4 Kent's Comm., 129, 130; Coke upon Littleton, 206a, 208b; Bacon's Abridgment, Tit. Condition (Q. 2); 2 Blackstone, 156; *Brewster v. Kidgill*, 1 Lord Raymond, 317; *Doe ex Dem. Marquis of Anglesea v. Churchwardens of Rugeley*, 6 Q. B., 114; *Scovill v. McMahon*, 62 Conn., 378, and other cases.

However, this case must be determined according to the construction placed upon the Hepburn act by the Supreme Court of the United States in two cases wherein contracts made by common carriers for the furnishing of free transportation were before court for consideration.

In the case of *Louisville & Nashville Railroad Company v. Mottley*, 219 U. S., 467, the facts were as follows:

Mottley and his wife received serious personal injuries by reason of a collision of railroad trains belonging to the Louisville & Nashville Railroad Company, and in consideration of the release of said company from all damages or claims for damages for injuries received by them in said collision the said railroad company agreed to issue free passes on said railroad and branches to the said Mottleys for the remainder of the year during which the release was obtained and to renew said passes annually during the lives of the said Mottley and wife, or either of them. This agreement was strictly adhered to for years, but the railroad company finally refused to further perform it on the ground

that the act of Congress, known as the Hepburn act, made its performance illegal. After certain proceedings in the United States court, which were ultimately dismissed for want of jurisdiction, an action was brought in the Circuit Court of Warren County, Kentucky, the relief sought being that the defendant company be required specifically to execute the above agreement by issuing passes to the plaintiff as provided by its terms. That action ultimately reached the Supreme Court of the United States, where the relief prayed for was denied, the court holding that the power of Congress to act in regard to matters involving interstate commerce is not to be hampered by contracts made in regard to such matters by individuals, but that contracts which are made concerning matters in the nature of interstate commerce are made subject to the possibility that even if valid when made, Congress may, by exercising its power, render them invalid; in other words, holding that all persons who make contracts concerning matters that subsequently may be regulated by Congress, under the power delegated to it to regulate interstate commerce, must do so having this power of Congress in view at all times.

However, it will be observed that the Mottley suit was brought to specifically enforce the agreement and that was the relief that was denied by the Supreme Court. But in the court's opinion, at page 486, it is said:

"Whether, without enforcing the contract in suit, the defendants in error may, by some form of proceeding against the railroad company, recover or restore the rights they had when the railroad collision occurred is a question not before us, and we express no opinion on it."

This case was decided February 20, 1911.

On December 17, 1915, the case of *New York Central & Hudson River Railroad Company v. Charles P. Gray* came before the Supreme Court of the United States for consideration, and on January 10, 1916, the court rendered its decision upon the question presented in that case. The facts in that case were briefly as follows:

1916.]

Short v. Railway.

In November, 1900, Gray made an agreement with the railroad company to make for the company a large map of the Vanderbilt lines for the World's Fair, which was to take place at Buffalo in the following year. The price agreed to be paid to him was \$750, of which \$150 was to be paid in cash and the balance in transportation between New York City and Girard, Pennsylvania. The map was made, delivered and accepted, and the cash payment of \$150 was made. At different times between the making of the contract and the month of September, 1906, Gray received from the railroad company transportation to the value of \$55.77. In September, 1906, he was refused transportation upon the ground that, because of the provisions of the Hepburn act, the company could furnish no further transportation on account of his services. He brought suit to recover the unpaid balance of the agreed price of the map, and the railroad company set up a defense that by the terms of the Hepburn act it was unlawful to furnish transportation for any part of an interstate journey in payment for services or for any other consideration except a regular fare paid in money. The trial court held that this constituted no defense and directed a verdict in favor of the defendant in error for the amount sued upon. The case ultimately reached the Supreme Court of the United States for review. The Supreme Court held that while the railroad company acted strictly in accordance with the law when it refused any longer to furnish transportation to Gray in performance of the contract, it did not necessarily follow that it could refuse to make just compensation in money for the unpaid balance of the purchase price of the map, and, speaking through Mr. Justice Pitney, the court used the following language in its opinion:

"But there is nothing in the act to prevent or relieve a carrier from paying in money for something of value which it had long before received under a contract valid when made, even though the contract provided for payment in transportation, which the passage of the act rendered thereafter illegal. In the Mottley case, while the right to further specific performance of the contract for free passage was denied, the court said:" (and then is quoted the exact language hereinbefore quoted from the Mottley case).

This opinion can be found in the advance sheets of the Supreme Court Reporter under date of February 15, 1916; 36 Supreme Court Rep., 176.

It would seem, therefore, that in view of the construction put upon the application of the Hepburn act to contracts which provide for the giving of free transportation on railroad trains for services rendered or property conveyed, it would be unjust to consider the principle of law with reference to conditions subsequent as determinative of the rights of the parties to this cause. It will be observed that the real consideration for this deed was the giving of the free transportation provided for therein. The railroad company has had the use of the property for a great number of years, and it may be assumed that the value of the use of the property would offset the value of the transportation that may have been furnished during those years, and it would seem in accord with the principles of natural justice that inasmuch as the railroad company can no longer comply with its contract by reason of the operation of the Hepburn act, the parties should be placed in the same position that they were prior to the making of this deed. Such a rule would seem to be in accord with the principles laid down in the two cases in the Supreme Court above cited.

Another consideration would impel the court to grant the relief prayed for herein, irrespective of that just discussed, and that is, the question as to whether or not the railroad company was justified in refusing transportation on the lines of its road which was entirely intra-state. It will be observed that the line of the railway company extended, at the time of the making of the deed, from Cincinnati, in the state of Ohio, to Lafayette, in the state of Indiana. The condition in the deed provided that not only should the said Short and his wife and children have free transportation on any of the trains of said railway company and its branches, but that said trains of the company should stop when requested at Fern Bank or any point on said road, or any of its branches, where said Short and wife, or either of them, may at any time be residing or sojourning. This, practically construed, means that the said Short and the other beneficiaries

1916.]

Short v. Railway.

of the condition could have transportation from any one point on the line of the road to any other point, irrespective of whether these points were the terminal points of the road or not; so that, therefore, the said Short might have transportation between two points entirely in the state of Indiana and between two points entirely in the state of Ohio. While it is true that he could not have this transportation as a part of an interstate journey without running afoul of the prohibition of the Hepburn act, nevertheless, there is no reason to so construe the deed as to make the provisions of the condition refer entirely to interstate journeys. The deed may be construed as contemplating intra-state journeys as well as interstate journeys, and, therefore, even if that part of the consideration for the transfer which might compel the giving of interstate passes would be unenforceable under the Hepburn act, nevertheless that part of it that might be construed as compelling the giving of intrastate passes would still remain enforceable.

There is nothing in the language of this deed that compels the court to construe its provisions as entire, and therefore the well known principle that where one, for a valid consideration, agrees to do two or more things, one of which is illegal, he may nevertheless be compelled to do the other or others, is applicable to the state of facts we have here. *Lange v. Werk*, 2 Ohio St., 520; *Widoe v. Webb*, 20 Ohio St., 431, at 435.

It can not be said in answer to this that both the statutes of Indiana and the statutes of Ohio prohibit the giving of transportation, in cases such as this, in the same manner and to the same extent in regard to intrastate journeys as the Hepburn act does in regard to interstate journeys. Neither the Indiana act or the Ohio act were in force at the time the contract sued on herein was made, but were enacted and passed a long time subsequent to the date of this contract and, indeed, were passed after the Hepburn amendment of June 29, 1906.

While one must concede, in view of the decision of the Supreme Court in the Mottley case, that persons making contracts of this kind must do so having in contemplation the fact that the power of Congress to regulate interstate commerce may make

their agreement, in so far as it provides for the giving of free transportation, null and void, nevertheless, persons making contracts with regard to free transportation that is purely intrastate, in so far as any prohibition subsequently sought to be made by the state or states against such contracts is concerned, have the protection afforded by Article I, Section 10, of the Federal Constitution, providing that no state may pass any law impairing the obligations of contracts, and of Section 1 of the Fourteenth Amendment of the Federal Constitution, providing that no state shall make or enforce any law which shall deprive any person of life, liberty or property without due process of law.

Therefore, in view of the considerations stated above, it is the court's opinion that an order should be made granting the relief prayed for in the petition herein.

The court does not pass upon any question concerning the rights of the defendant, if any, under the occupying claimant act or its power of eminent domain.

NOTE.—After the above opinion was written, but before it was announced, counsel for the defendant called the court's attention to the case of *The Dayton, Xenia & Belpre Railway Company v. Lewton*, 20 Ohio St., 401, with the request that the court consider the decision in that case before passing upon the question involved in the case at bar.

However, nothing in that case can in any way affect the conclusion herein. Lewton had agreed to give a right-of-way to the railway company over certain of his property for an agreed consideration to be paid in installments. The company entered upon and constructed its road over the property of Lewton in pursuance of said agreement, but neglected to pay the second and third installments as had been provided for in the contract, and also neglected to demand and receive a deed from Lewton. The company subsequently was merged with another company and Lewton brought suit against it to enforce a vendor's lien upon the property that had been conveyed. The court decreed a sale of the specific property, but on review in the Supreme Court it was held that inasmuch as the public had acquired a

1916.]

Building Co. v. Piano Co.

right to have the highway kept open and as the sale of a particular portion of said railway would exclude the public from its right to have it operated as a continuous line, the order of sale should be directed as against the whole line of the railway company and not against a specified portion. In other words, the Supreme Court directed that the whole railway be sold as such.

However, that was an action in equity, while this is an action at law, and as it appears from the reasons above stated that the issues herein are with the plaintiff, the court can not see that the questions that arose in the case last cited can control or have any effect on the questions to be decided herein. If it shall subsequently appear that the rights of the public are being interfered with by this court's order, the court will stay proceedings herein until steps shall have been taken to preserve the rights of the public.

RIGHTS IN A PARTY WALL.

Common Pleas Court of Hamilton County.

THE MITCHELL STORE BUILDING COMPANY V. THE STARR PIANO
COMPANY ET AL; AND THE AEOLIAN COMPANY V.
THE STARR PIANO COMPANY ET AL.

Decided, June 6, 1916.

Buildings—Signs Painted on a Party Wall—Can Not be Obliterated or Interfered With by the Owner or Lessee of the Adjoining Building of Which the Wall Forms a Part.

A party to an agreement, under which a party wall was erected by the parties, which wall stands half upon the land of each, may use the side of the wall resting upon his own land for any purpose which does not impair its strength or interfere with its use as a party wall, and, therefore, will not be enjoined from painting a business sign on his side of such wall.

DeCamp & Sutphin, for the Mitchell Company.

Jelke, Clark & Forchheimer, for the Aeolian Company.

Guido Gores, contra.

MAY, J.

In 1872, Robert Mitchell and the estate of George Carlisle owned adjoining premises on Fourth street, Cincinnati, between Race and Vine. On September 4th of that year Mitchell and John Carlisle, on behalf of the estate of George Carlisle, entered into a party-wall agreement, by which it was provided that Robert Mitchell should erect a brick wall on the line between the two properties, twenty inches thick, situated so that the center of the said wall shall be exactly on the line of said lots, and that whenever the Carlisle estate elect to and do actually build upon and use said party wall they shall pay to Robert Mitchell one-half of the actual cost of the wall. In pursuance of the agreement Mitchell erected the party wall, as provided for, and later the Carlisle estate, upon the erection of the St. Nicholas Hotel, paid its one-half of the cost of the wall. The St. Nicholas Hotel property was sold and by mesne conveyances the St. Nicholas Hotel property is now vested in one of the defendants herein, and the Starr Piano Company has a lease, with the privilege of purchase, on the east twenty-six feet of said property, immediately adjoining the Mitchell property. The St. Nicholas building was torn down and the Starr Piano Company is proceeding to erect a building for its own purposes upon the lot. The Mitchell Store Building Company and its lessee, the Aeolian Company, are now seeking to enjoin the Starr Piano Company from maintaining a sign painted upon the surface of the party wall, which stands upon ten inches of ground formerly belonging to the Carlisle estate and now owned either by the Starr Piano Company or its lessor. The sign is a business sign, and states that the Starr Piano Company will occupy the premises upon which the building is being erected.

The evidence disclosed the fact that the new building, when finished, will merely reach to the bottom of the sign.

1916.]

Building Co. v. Plano Co.

The Mitchell Company contends that under the agreement Mitchell is the absolute owner of the wall, with an easement merely in the Carlisle estate, or its successor in title, and that the wall can only be used for party wall purposes, and that the painting of a sign upon such wall is not such usage.

The defendant companies contend that they are the owners in severalty of that part of the party wall that stands upon their own ground and that they have the right to use the wall for any purpose so long as it does not interfere with its use as a party wall.

Whatever may be the law outside of Ohio, it is well settled in this state, by the case of *Hiatt v. Morris*, 10 Ohio St., 523, that the rights and liabilities of parties to a party-wall agreement must depend upon the provisions of the contracts between them and the principles of law applicable to those provisions.

An examination of the agreement clearly leads to the conclusion that the parties intended to provide for a party wall, and that when the Carlisles paid for their part they were to have the right to use said brick wall as a party wall:

“The said Carlisle, executor, his successors and assigns, shall at any time thereafter when he or they may desire have the right to use said brick wall as a party wall.”

Therefore, this wall being a party wall, the rights and liabilities of the parties must be fixed by the general rule governing party walls erected by agreement between adjoining land owners.

In the United States the general rule is that the owners of a party wall, standing in part upon the land of each, are not tenants in common of the wall, but each owns in severalty so much thereof as stands upon his lot, subject to the easement of the other for support and equal use thereof. 30 Cyc., 772, and cases cited.

In support of plaintiff's contention, the case of *Bedell v. Ritzenhouse*, 5 Pa. District Rep., 689, was cited.

This case, as well as another Pennsylvania case, that of *Wistar v. American Baptist Publication Society*, 2 W. N. C., 333, were

distinguished in a recent Pennsylvania case, that of *Reilly et al v. Widmyer*, 23 Pennsylvania District Rep., 176, also reported in the Philadelphia Legal Intelligencer of February 27, 1914, decided by Landis, Judge, in the equity division of the Common Pleas Court of Lancaster County. This latter case is exactly in point with the case at bar. The learned judge says that the two Pennsylvania cases above referred to may be distinguished from the case he has under consideration because the defendants in those cases were not attempting to use their own wall upon which to paint the sign, but were attempting to use the portion of the wall that belonged to the adjoining neighbor.

In *Reilly v. Widmyer*, Widmyer was the owner of the ground upon which one-half of the party wall was located and he had erected a building on that lot which did not reach to the top of the wall, and above the roof of the building he painted a business sign of the Widmyer Company. Reilly sought to enjoin it. In the course of his opinion the court said:

"Each of the adjoining owners of a party wall has a right to use the whole of his own side thereof, if such does not conflict with the equal rights of the other owner."

He also cites 2 *Washburn on Real Property*, 386:

"The building of a wall at a joint expense by two parties, which stands one-half upon the land of each, does not make them tenants in common thereof. Each owns his part in severalty, though each has a right to use the wall as an easement."

The learned judge also says in the course of his opinion:

"A party wall is solely for the purpose of support, and outside of this the respective parties may use their land uninterrupted by the adjoining owners. Therefore, the surface of the party wall enclosed within the houses of which it forms a part may be used by the respective parties as they see fit, for that portion is upon their land and that use does not impair the purposes for which the wall was erected. If the wall is part of the building, can not the owner paint or paper it, or ornament it, according to his own pleasure? Ought there be any diminu-

1916.]

Building Co. v. Plano Co.

tion of right in the owner of the land to use the face of the wall which rests on his property because he has not erected a building upon it, or because he has not seen fit to build his building to its utmost height?"

The court answered its query affirmatively and denied the injunction against the maintaining of the sign.

In *Shiverick v. Gunning Company*, 58 Neb., 29, the court recognized the right of the owner of one-half of a party wall to paint a sign on the surface of such wall. The Gunning Company, who were the plaintiffs below, had leased from the owner of the party wall the right to paint a sign thereon. Shiverick, the owner of the west half of the wall, taking exceptions to the sign, went over upon the property and obliterated the sign. The Gunning Company brought suit and a verdict in favor of the plaintiff was directed. The case was reversed on rehearing, 59 Neb., 73, for a wrong ruling on the measure of damages. But the case is squarely in point as to the right of the owner of one-half of a party wall to use the part of the wall that stands upon his ground for the purpose of painting a sign thereon. The court says in 58 Neb., 29:

"The principal question presented for our consideration is raised by the giving of the first paragraph of the instructions, which was to the effect that the plaintiff had the right, under its lease, to paint and maintain the sign in question upon the east surface of the wall, and that the defendants are liable for the damages sustained by the obliteration of such sign. This instruction substantially directed a verdict for the plaintiff below, which, in our view, was entirely proper. * * * The wall in question was built by two adjoining lot owners, under a written contract so that one-half of the wall, divided longitudinally, rested on the one's lot and the other half on the other's lot. Each party to the agreement paid one-half of the cost of constructing the wall, and each was the owner in severalty of the portion that stood upon his land, subject to the easement or right in the other to have it support the building which he might erect. * * * Applying the principle * * * the defendants below had no right to go upon the lot of the adjoining owner and obliterate the sign."

The Pennsylvania case and this Nebraska case, neither of which was cited by counsel, are the only cases I have been able to find that are directly in point. But even without these authorities I am of the opinion that the owner of one-half of a party wall has a right to use that wall for any purpose not inconsistent with its use as a party wall. This seems to be the rule in the English courts. See *Mayfair v. Johnson* (1894), 1 Chancery, 508, 515, where North, Judge, says: "Each owner controls his half of the land and may do with it what he likes." See also *Much v. McDermott*, 8 A. & E., 138, 142; *Matts v. Hawkins*, 5 Tauton, 20; *Stedman v. Smith*, 1 E. & B., 1.

In the case of the Aeolian Company, it is claimed that because the Aeolian Company are engaged in the same line of business that the Starr Piano Company is engaged in, that the sign is misleading and is apt to interfere with the business of the Aeolian Company.

An examination of the sign convinces the court that there is no element of unfair competition involved in this case.

For these reasons the petition in each case will be dismissed.

1916.]

Cincinnati v. Railway.

MUNICIPALITY A MERE VOLUNTEER IN REPAIRING BRIDGE.

Common Pleas Court of Hamilton County.

**CITY OF CINCINNATI V. INTERURBAN RAILWAY &
TERMINAL COMPANY.***

Decided, January 19, 1914.

Bridge—Located on a Free Turnpike—Interurban Railway Company Liable for Repairs Under Contract with County Commissioners—Locality of Bridge Annexed to City, Which Made Repairs—But in so Doing Was a Mere Volunteer and Can Not Recover Cost of Repairs from Interurban Company.

1. The duty of repairing bridges over streams on free turnpikes and county roads is, under the provisions of Section 2421 and Section 7557, General Code, vested entirely in the county commissioners, and the county commissioners being chargeable with this duty can not be relieved by the annexation of the territory in which such bridge exists by a municipal corporation, and when, by contract with the county commissioners, an interurban railway company using that bridge agrees to perform, at the instance and direction of the county commissioners, this duty of repair, the county commissioners alone can determine when the necessity for such repair exists and alone can enforce the contract, notwithstanding the annexation of the territory.
2. Section 3714, General Code, prescribing the statutory duty of a municipality with reference to bridges, streets, highways, etc., within the municipality, is not in conflict with Section 2421 of the General Code and its kindred section, 7557, General Code.
3. Where a municipal corporation, after annexation of the territory containing such a bridge as is provided for in Section 2421 and Section 7557, General Code, undertakes to repair the bridge after notice to an interurban railway company using said bridges, which, by the terms of its franchise granted by the county commissioners, is compelled to keep in repair when notified of the necessity thereof by the said county commissioners, the said municipal corporation will be regarded as a mere volunteer and will not be permitted to recover the cost of repairing said bridge.

*Reversed by the Court of Appeals, *Cincinnati v. Interurban Ry. Co.*, *Court Index*, August 16, 1915.

Judgment of the Court of Appeals reversed and that of the Common Pleas affirmed by the Supreme Court without report, May 18, 1916.

Dinsmore & Shohl, for the demurrer.

Coleman Avery, Assistant City Solicitor, contra.

GEOGHEGAN, J.

Heard on demurrer to petition.

This is an action brought by the city of Cincinnati to recover from the defendant, the Interurban Railway & Terminal Company, the sum of \$1,587.05, by reason of certain repairs made by said city upon a certain bridge over the Little Miami river, which repairs the plaintiff claims should have been made by the defendant company. The facts as they appear upon the face of the petition, upon which this claim is based, are in substance as follows:

On March 27, 1901, the Cincinnati & Eastern Electric Railway Company obtained a franchise to construct, maintain and operate, for a term of twenty-five (25) years, an electric railway upon the Columbia & New Richmond turnpike from the corporation line of the city of Cincinnati, as it then existed, to the boundary line between Hamilton and Clermont counties. One of the terms and conditions of said franchise was as follows, to-wit:

"9th. The said the Cincinnati & Eastern Electric Railway Company, its successors and assigns, hereby agree as a consideration for this grant and franchise, to maintain, repair, and rebuild whenever necessary, during the life of this grant, all of the bridges and culverts, over the route herein specified upon which it may place and maintain its tracks, at its own cost and expense, and under the direction of the county engineer and county commissioners; the maintenance of said bridges shall include their approaches, abutments and floors, together with the painting of the iron work, and shall be done at such times as the board of county commissioners may deem necessary."

The defendant herein became the assignee, under a consolidation agreement, of the franchise of the Cincinnati & Eastern Electric Railway Company, and therefore became liable for the performance of the contracts of the Cincinnati & Eastern Electric Railway Company, especially the contract to repair, maintain and rebuild bridges and culverts, as above set forth.

1916.]

Cincinnati v. Railway.

It is further stated in the petition that the city of Cincinnati, by annexation proceedings, annexed the territory embracing that portion of the Columbia & New Richmond turnpike where it crossed the Little Miami river by bridge, over which the defendant company operated its cars; that by virtue thereof the city of Cincinnati succeeded to the rights of the county commissioners to compel the defendant to keep the bridge over the Little Miami river in repair as provided in the franchise; that the bridge became out of repair; that the city of Cincinnati notified the defendant company; that the defendant company neglected to make the repairs; that the bridge became dangerous for, and a menace to, public travel thereon, and that therefore the city, upon the failure of the defendant company to comply with said notice to make necessary repairs, did make the repairs at a cost of \$1,587.05, which it now seeks to recover from the defendant railway company.

The demurrer is based upon the theory that the city of Cincinnati was not charged in law with the maintenance and repair of a bridge such as is described in the petition, and that the city of Cincinnati, in making the repairs, was a mere volunteer and hence can not recover.

This proposition is based upon the theory that Section 2421, General Code, provides that:

“The commissioners shall construct and keep in repair necessary bridges over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners.”

This section is found in Title X, Div. II, Chap. 1, of the General Code, caption “County Commissioners,” sub-caption “Bridges.”

It is claimed that under this section, as well as a kindred section known as Section 7557, General Code, under Title IV, Chap. 14, caption "Bridges," which is in effect and language practically the same as Section 2421 above quoted, the duty of repairing bridges over streams on free turnpikes and county roads, such as the Columbia & New Richmond turnpike is conceded to be for the purposes of this demurrer, is vested entirely in the county commissioners, and that therefore the county commissioners being chargeable with the duty of repairing such bridges they can not be relieved of that duty by the annexation of the territory in which the bridge exists, by a municipal corporation, and when by contract with the county commissioners an interurban railway company using that bridge agrees to perform at the instance and direction of the county commissioners the duty of repair, the county commissioners are the only ones who can determine when the necessity for such repair exists and are the only ones who can enforce that contract notwithstanding the annexation of the territory.

It seems that this view is tenable.

It will be observed that the statute provides that the duty is upon the county commissioners, except where bridges are wholly in cities having by law the right to demand and do demand and receive part of the bridge fund levied upon property therein. However, it is practically conceded that under the present state of the law no city or village in the state of Ohio has by law the right to demand a part of the bridge fund.

Prior to the passage of the General Code, there existed in the statutes of Ohio a section known as Section 2824, Revised Statutes, which provided in substance that the county commissioners at their March and June sessions might levy a tax for road and bridge purposes in the various counties of the state, in a rate apportioned according to the taxable value of the property of the county, and provided further that a portion of said fund collected in Hamilton county should be paid into the city treasury of Cincinnati and expended by the board of administration of said city for the purpose of building and repairing bridges within the corporate limits where the board of legislation de-

1916.]

Cincinnati v. Railway.

manded it. This latter portion of the statute providing for the payment to the city of Cincinnati was framed in that kind of language which the Supreme Court of this state declared to be arbitrary classification of municipalities. *State, ex rel, v. Jones*, 66 Ohio State, 453; *State, ex rel, v. Beacom*, 66 Ohio State, 491.

Section 2824, Revised Statutes, is now known as Section 5635 of the General Code. An examination of Sections 5635 and 5636, General Code, discloses the fact that all the amendments to original Section 2824, Revised Statutes of Ohio, which came within the inhibition of arbitrary classification referred to above have been dropped by the codifiers, upon the theory, I assume, that the rule laid down in the cases last referred to rendered those parts of that original section unconstitutional. So, it is clear that the city of Cincinnati has no right to demand in law a portion of the bridge fund.

The city solicitor claims that the city had the right to make these repairs because of the duty imposed upon the city by the provisions of Section 3714, General Code, formerly known as Section 2640, Revised Statutes.

This section is well known and prescribes the statutory duty of the municipality with reference to bridges, streets, highways, etc., within the limits of the municipality. It is in substance as follows:

“ * * * The council shall have the care, supervision and control of public highways * * * bridges, aqueducts and viaducts, within the corporation, and shall cause them to be kept open, in repair and free from nuisance.”

However, I do not think that it can be claimed that this section is in conflict with Section 2421 of the General Code. In the latter section the duty of repairing bridges on turnpikes or county roads, even though within the municipality, is placed upon the county commissioners. The duty of seeing that they are kept open, in repair and free from nuisance is upon the council of the city or village.

While the city may be liable for the failure to properly guard or give notice of the defective condition of a bridge, in so far

as the question of repair is concerned, the county commissioners having by law the definite and fixed authority to levy taxes for the repair of bridges, it must be their duty to expend the money received from such levy in the repair of bridges that are properly placed within their jurisdiction by the provisions of Section 2421, General Code.

In *Perry County v. Railroad Company*, 43 Ohio State, 451, it was held that the county commissioners of Perry county had the right to bring an action and recover damages for the expense of repairing a bridge within the corporate limits of the village of Somerset, in said county, that had been destroyed by the railroad company, for the reason that said bridge was upon a county road and the village of Somerset had not received a part of the bridge fund raised by the county commissioners by tax levy.

This case distinguishes the case of *Railroad Co. v. Commissioners*, 35 Ohio State, 1, relied upon by the city solicitor, by showing that the case in 35 Ohio State involved the question of obstruction of a state or county road within the corporate limits of a municipal corporation and that therefore the county commissioners could not maintain an action for the obstruction of that part of a highway which is within the limits of the corporation, the real distinction being that the county commissioners, under the act of 1873, were entitled to recover damages for the obstruction of county roads and were compelled by law to appropriate the damages recovered in repairing the road or removing the obstruction, but as the control of highways in the corporation is confided to the corporate authorities, the commissioners could not apply such moneys within the corporate limits.

In *Piqua v. Geist, a Minor*, 59 Ohio State, 163, the city of Piqua attempted to obtain damages because of a personal injury judgment that had been obtained by reason of a defective bridge within the corporate limits of Piqua. The Supreme Court denied the relief sought against the county commissioners for the reason that it was not shown that the bridge upon which the injuries occurred was part of a state or county road and that therefore the duty to keep such bridge in repair was upon the city of Piqua.

1916.]

Cincinnati v. Railway.

The cases of *Mooney v. St. Marys*, 15 C. C., 446; *Newark v. McDowell*, 16 C. C., 556, and *Newark v. Jones*, 16 C. C., 563, clearly distinguish between the liability of the municipal corporation for failure to guard against dangers on bridges within its limits and the duty of the county commissioners to keep in repair bridges over streams and public canals which constitute part of county roads, and I think in the main support the distinction that I have referred to above.

I have carefully examined the statutes providing for annexation of territory to municipal corporations and in no place can I find that the city in any manner succeeds to the duty of the county commissioners to repair roads and bridges of the character of the one described in this petition. If that be true, certainly the city can not succeed to rights under a contract whereby, in consideration of a franchise granted, the company receiving the franchise agrees to bear the expense of repairing bridges that the county commissioners are charged by law to repair.

Therefore it seems to me, in the absence of express statutory authority upon this subject, that the action of the city in repairing this bridge was the action of a mere volunteer and that the defendant company has and had at the time a right to insist that the county commissioners should determine whether or not the necessity for the repairs existed, in accordance with the terms of its contract entered into with the said county commissioners.

The demurrer will therefore be sustained.

**FUNDS FOR REBUILDING COUNTY ROADS WITHIN
MUNICIPAL LIMITS.**

Common Pleas Court of Marion County.

STATE, EX REL LLEWELLYN ALLEN, v. J. HENRY RAUB ET AL.*

Decided, 1916.

Limitations on Authority of County Commissioners—May Repair but Not Reconstruct—And Repairs May be Carried Only to Point Where the Street Has Been Curbed and Guttered—Emergency Funds May Not be Used for Rebuilding a Worn Out Road—Sections 3714, 7419 and 7422.

1. Emergency funds, raised under Section 7419, can not be used by county commissioners for rebuilding a worn out road, nor can a contribution be made from such funds toward the rebuilding of that part of such a road which lies within municipal limits.
2. The jurisdiction of county commissioners over a road lying within the limits of a municipality is limited to the repair of such a road up to the point where the sidewalks have been curbed and guttered, and no further.
3. The funds available for repair of a road within municipal limits are those raised under Section 7422 rather than Section 7419, G. C.

C. L. Justice, for plaintiff.

Homer E. Johnson, Prosecuting Attorney, and *Ford Warner*, City Solicitor, contra.

*Affirmed by the Court of Appeals in the following memorandum:
"Finding and decree for plaintiff awarding perpetual injunction as prayed for in plaintiff's petition, on the reasoning of the opinion of Judge Duncan in the court below, and on the added ground that if it be assumed that Section 7419, G. C., will permit expenditure of funds, raised as therein provided, for repair or construction, either partially or completely, of part of a principal highway lying within a municipality, yet the improvement in question has not been shown by the evidence or agreed facts to be necessary by reason of any of the causes enumerated in said section, or that the portion of the highway covered by the improvement is in the condition contemplated by said section."

*Motion for an order directing the Court of Appeals to certify its record overruled May 16, 1916.

1916.]

State, ex rel, v. Raub et al.

DUNCAN, J.

This case was brought by a tax-payer to enjoin the county commissioners from contributing to the improvement of North Main street in the city of Marion, from Fairground street north to the corporation line, by grading and paving the same to the width of thirty-six feet, together with the necessary curbing, gutters and catch basins, as per plans and specifications adopted therefor.

This street, prior to May 14, 1889, when it was taken into the city by the annexation of contiguous territory, was what is known as the Marion-Bucyrus Pike, and was improved as such by the county commissioners. It is now practically worn out and needs reconstruction. That is to say, a new pike should be built on the old foundation.

In the construction of the proposed improvement the city authorities and the county commissioners have agreed that the county shall construct a six-inch concrete foundation and that the city shall construct the balance. To pay for the concrete foundation, the commissioners propose to use funds realized from the levy of taxes under Section 7419, General Code, as follows:

"When one or more of the principal highways of a county, or part thereof, have been destroyed or damaged by freshet, land-slide, wear of water-courses, or other casualty, or, by reason of the large amount of traffic thereon or from neglect or inattention to the repair thereof, have become unfit for travel or cause difficulty, danger or delay to teams passing thereon, and the commissioners of such county are satisfied that the ordinary levies authorized by law for such purposes will be inadequate to provide money necessary to repair such damages or to remove obstructions from, or to make the changes or repairs in, such road or roads as are rendered necessary from the causes herein enumerated, they may annually thereafter levy a tax at their June session, not exceeding five mills upon the dollar upon all taxable property of the county, to be expended under their direction or by the employment of labor and the purchase of materials in such manner as may seem to them most advantageous to the interest of the county, for the construction, reconstruction or repair and maintenance of such road or roads or part thereof."

The question then arises whether under the facts and circumstances the county commissioners have the right to thus contribute to the proposed improvement.

It is very doubtful whether any of the money raised under the provision of said Section 7419 can be used any place in the county for the construction of a new road as is here contemplated. This section is more in the nature of an emergency statute. The law of this state does not contemplate that the county commissioners may improve the roads of the county generally out of county funds, or improve some in this way and others by assessing the cost and expense thereof against abutting lands.

It would seem from the reading of this section that its purpose was to furnish the means to "repair the damages" to a highway "destroyed or damaged" from certain causes or to "remove obstructions from, or to make the changes or repairs" in a highway "unfit for travel or cause difficulty, danger or delay to teams passing thereon," from other causes. Aside from this the council of the city by virtue of the provisions of Section 3714, General Code, has exclusive jurisdiction over all streets therein, modified by the duty of the county commissioners under the provisions of Section 7444, General Code, to keep the improved roads therein in repair to points "where the sidewalks have been curbed and guttered and no farther." Said Section 3714 reads as follows:

"Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance."

Said Section 7444, General Code, reads as follows:

"The county commissioners shall keep in repair the portions of such roads within their respective counties, as are included within the corporate limits of a city or village in such counties, to points therein where the sidewalks have been curbed and guttered, and no farther."

1916.]

State, ex rel, v. Raub et al.

In support of this view it is held in *Wabash Ry. v. Defiance*, 52 Ohio St., 262, 299, 301, construing Section 2640, Revised Statutes, now Section 3714, General Code, that:

“Where part of a county road is taken into a municipal corporation by the annexation of contiguous territory, it is subject to the control and supervision of the municipal authorities, who may improve it by grading, or otherwise, at the expense of the corporation.”

The money, however, which may be used to “repair” roads within the city, is such money as may be raised under the provisions of Section 7422, General Code, and not under Section 7419, General Code. Said Section 7422 reads as follows:

“The county commissioners shall cause all necessary repairs to be made for the proper maintenance of all improved roads in the county. For such purpose they may levy a tax upon the grand duplicate of the county, not exceeding three-tenths of one mill in any one year upon each dollar of the valuation of taxable property in such county. Such levy shall be in addition to all other levies authorized by law, notwithstanding any limitation upon the aggregate amount of such levies now in force.”

So that the authority of the county commissioners over city streets is not only limited to points therein “where the sidewalks have been curbed and guttered,” but to “repairs” also, and the proposition that the commissioners may contribute to the proposed paving of North Main street by constructing the concrete foundation therefor, is, in my opinion, unauthorized by law.

Holding these views, the injunction prayed for herein will be granted.

**MAINTENANCE OF A COUNTY HOSPITAL FOR THE
INSANE.**

Court of Common Pleas of Hamilton County.

STATE OF OHIO, EX REL JOHN V. CAMPBELL, PROSECUTING
ATTORNEY, v. FRED E. WESSELMANN ET AL.*

Decided, March 3, 1916.

Insane Asylums—Though Public Are Not Necessarily State Institutions—May be Built by County Taxation—Bonds May be Issued by County Commissioners—For New Buildings or Repair of those in Existence—Power of County Commissioners Under Section 2333.

Longview Hospital, formerly known as Longview Asylum, was founded by Hamilton county from the funds raised by local taxation on the property in that county, and all the property belonging to that institution is owned by the county, and the commissioners of Hamilton county, the necessary statutory steps having been taken under Section 2333 of the General Code, have authority to issue bonds for the purpose of repairing buildings belonging to that institution or erecting buildings necessary for the proper administration of that institution, and they have like authority under Section 2434 of the General Code.

*Campbell, Hickenlooper, Hauck & Capelle, for plaintiff.
Herman P. Goebel, contra.*

MAY, J.

The State of Ohio, upon the relation of John V. Campbell, prosecuting attorney, has filed its petition in this court against the county commissioners and against the board of directors of the Longview Hospital, asking for an injunction against the county commissioners from issuing bonds of Hamilton county for the repair of existing buildings and the erection of new buildings for Longview Hospital, it having been determined by a vote of the people, on the 5th day of November, 1912, that such bonds be issued, and in the alternative asking for an injunction

*Affirmed, *State, ex rel, v. Wesselmann et al*, 25 C.C.(N.S.), —.

1916.]

State, ex rel, v. Wesselmann et al.

against the directors of Longview Hospital from controlling, disbursing or expending the proceeds derived from the sale of the bonds, or any part thereof, for the purposes mentioned, without first applying to the judges of the court of common pleas for the appointment of a building commission, as provided under Section 2333 of the General Code.

To this petition the defendants have filed a demurrer.

The petition sets out at length all the proceedings that have been taken by the county commissioners in reference to the proposed bond issue, to-wit, that on the 16th day of August, 1912, the county commissioners passed a resolution declaring it necessary to expend \$500,000 for the construction, enlargement, repair and improvement of the buildings for the accommodation of the inmates of Longview Hospital for the insane, and further declaring it necessary to issue bonds of the county of Hamilton in the amount of \$500,000 to obtain money for such purposes, and at the same meeting it was further resolved that the question of policy of making such expenditure be submitted to the voters of Hamilton county at the election held on November 5, 1912. The petition then sets out that the requisite preliminary steps were taken and that the board of deputy state supervisors and inspectors of elections certified to the county commissioners that at the election so held 70,709 votes were cast for said issue and 26,519 votes were cast against said issue, which shows a legal majority in favor of the issue of said bonds. The petition further states that the county commissioners took no action in reference to the issue of said bonds until the 28th day of January, 1916, when a resolution was adopted authorizing the issue of \$295,000 additional building bonds and \$5,000 for repair of existing buildings. The relator alleges that the proceedings of the board of county commissioners are null and void inasmuch as there is no authority in the board of county commissioners to issue bonds for the purposes mentioned.

I am of the opinion that the board of county commissioners, under the provisions of the General Code, has full authority to issue bonds for the purposes set out in the petition, provided the necessary statutory steps have been taken.

At this date it is too late to claim that the Longview Hospital is not a county institution. An examination of the legislation on this subject during the past sixty years shows conclusively that the Longview Hospital for the insane is a county institution. See especially, Ohio Laws Vol. 55, page 170; 56 O. L., 170; 58 O. L., 152; 63 O. L., 149; 64 O. L., 246; 65 O. L., 272; 66 O. L., 78; 70 O. L., 178; 71 O. L., 182; 75 O. L., 93; also General Code, Sections 2004 to 2034.

If there was ever any doubt on the question as to whether or not Longview Hospital is a county institution, that doubt has been removed by the decision of the Supreme Court in the case of *Chalfant v. State*, 37 Ohio St., 60. The Supreme Court in that case expressly held that Longview Asylum, though a public, is not a state institution, and at page 62 say:

“Under acts of the General Assembly, Longview Asylum was founded by Hamilton county, from funds raised by local taxation on the property in that county; and all the property belonging to the institution is admittedly owned by the county.”

The relator, however, claims that the commissioners of Hamilton county have no authority to issue bonds for the purposes mentioned, for the reason that the Longview Hospital or Longview Asylum is not expressly mentioned in Section 2433 or Section 2434 of the General Code.

Section 2433 of the General Code reads:

“When, in their opinion, it is necessary, the commissioners may purchase a site for a court house, or jail, or land for an infirmary or a detention home, or additional land for an infirmary or children’s home, at such price and upon such terms of payment, as are agreed upon between them and the owners of the property. The title to such real estate shall be conveyed in fee simple to the county.”

Section 2434 of the General Code reads:

“For the execution of the objects stated in the preceding section, or for the purpose of erecting or acquiring a building in memory of Ohio soldiers, or for a court house, county offices, jail, county infirmary, detention home, or additional land for an

1916.]

State, ex rel, v. Wesselmann et al.

infirmary or county children's home, or other necessary buildings or bridges, or for the purpose of enlarging, repairing, improving, or rebuilding thereof, or for the relief or support of the poor, the commissioners may borrow such sum or sums of money as they deem necessary * * * and issue the bonds of the county to secure the payment of the principal and interest thereof."

It is true that a strict construction of this section would sustain the view of the relator, but I am of the opinion that even if this section is the controlling section, that the words in Section 2434, "for the purpose of erecting or acquiring" certain buildings, mentioning them, "or other necessary buildings," is broad enough to give the county commissioners of any county, which has an insane asylum which has been recognized for more than sixty years by the Legislature as a distinct county institution, and which the Supreme Court has expressly held is not a state institution but a county institution, authority to issue the necessary bonds, especially where they have been authorized to do so by the necessary vote of the people.

However, I am of the opinion that the county commissioners have full authority, under Section 2333 of the General Code, to issue the bonds for the purposes mentioned in the petition. That section reads:

"When county commissioners have determined to erect a court house or other county building at a cost to exceed twenty-five thousand dollars, they shall submit the question of issuing bonds of the county therefor to the vote of the electors thereof."

This was done in this case and the result of the election, as certified to by the board of deputy state supervisors and inspectors of elections, showed a large majority in favor of the proposition.

I am therefore of the opinion that both under Section 2333 and Section 2434 of the General Code, the proposed bond issue is a valid bond issue, and for this reason the demurrer to the first cause of action set out in the petition will be sustained.

The second cause of action in the petition asks for an injunction against the expenditure of any funds derived from the sale

of the bond issue until application has been made to the court of common pleas for the appointment of four suitable and competent freehold electors of the county, who shall, in connection with the county commissioners, constitute a building commission and serve until its completion, and not more than two of such appointees shall be of the same political party.

At the argument counsel for the defendants admitted that such a commission would have to be appointed before any funds realized from the sale of the bonds are expended. It is unnecessary, therefore, for the purpose of determining the validity of the bond issue to pass upon the demurrer to this second cause of action.

The finding of the court herein is, that the county commissioners have full authority to proceed to take the necessary steps to sell bonds for the purposes set out in the resolution, namely, to repair existing buildings and to erect new buildings, and the determination of the expenditure of the money realized from such proposed sale will be continued until such time as an effort is made upon the part of the defendants to disburse such funds without complying with Section 2333 of the General Code.

A decree in accordance with this finding may be drawn.

1916.]

Shimmon v. Screw & Tack Co.

**STATUS OF PREFERRED STOCK ISSUED IN THE PURCHASE
OF THE ASSETS OF ANOTHER
CORPORATION.**

Common Pleas Court of Cuyahoga County.

CLAUDE W. SHIMMON v. NATIONAL SCREW & TACK CO. ET AL.

Decided, April 19, 1916.

Corporations—Dividends on Preferred Stock Limited to Those Prescribed in the Certificate—Not Invested With Profit Participating Quality of Common Stock—By Reason of Failure of Charter to Authorize an Issue of Preferred Stock—Acquiescence in the Provisions of a Contract—Meaning of the Word "Share."

1. Where the entire assets of a corporation are sold to another company, and payment is made by issuing to the stockholders of the selling company shares in the purchasing company which are cumulative and preferred both as to dividends and assets, redeemable at any time at par with accrued dividends at the option of the purchasing company, the holders of said preferred stock have no right to demand a rate of dividend higher than that named in the certificate or to share in the dividends which are being paid on the common stock.
2. Absence from a certificate of incorporation of any provision for issuing preferred stock does not change the temporary character of preferred stock which may have been issued in payment for the assets of another company, or invest it with profit sharing qualities in addition to its interest bearing and preferential character.
3. Stockholders of a failing corporation, almost unanimously voting to sell its property to another corporation, accepting in payment thereof from the purchasing company preferred stock, having representation on the board of directors receiving notice and voting to issue stock dividends to the holders of common stock, and taking the stipulated dividends for several years, the preferred stock directors being present at all meetings of the board of directors and never objecting to such issues of stock dividends, thereby indicate that they construe the contract to be an acceptance of preferred stock with fixed though not participating dividends, and the purchaser of shares of such preferred stock from an original holder has no better or different rights to change the

temporary character of such stock to profit participating common stock.

4. The term, "share," as applied to corporate stock contains no magic to destroy the right of contract, or to make preferred stock with specific dividend limitations profit sharing when common stock is voted as stock dividends.
5. A certificate of preferred stock, expressing on its face a limitation of interest rate and providing for a fixed preferential cumulative dividend, is a contract for a dividend that can not be changed or passed by the corporation issuing it and which the holder must receive if profits are realized.

Howell, Roberts & Duncan, for plaintiff.

M. P. Mooney and Tolles, Hogsett, Ginn & Morley, contra.

FORAN, J.

Prior to January 1, 1908, there existed in the city of Cleveland two Ohio corporations, the National Screw & Tack Company and the Union Steel Screw Company, the outstanding stock of the National Screw & Tack Company being \$1,000,000, and that of the Union Steel Screw Company being \$542,500. The latter company was a going concern, but not operating to the satisfaction or benefit of those having capital invested therein. The former company was regularly paying dividends of 6 per cent. to its stockholders, and had assets exceeding all its liabilities, other than its capital stock, in the sum of \$1,366,886, as found by accountants satisfactory to both companies.

About January 1, 1908, negotiations began or were had between the two companies, which resulted in an offer by the National Screw & Tack Company to purchase the plant and assets of the National Steel Screw Company for \$461,125, to be paid in the preferred stock of the National Screw & Tack Company. This proposition was submitted to the board of directors of the Union Steel Screw Company March 13, 1908, and suitable resolutions were adopted providing for its acceptance. A printed notice, of date March 28, 1908, was accordingly mailed to each stockholder that a special meeting of the stockholders was called to convene at the office of the company April 30, 1908.

1916.]

Shimmon v. Screw & Tack Co.

to consider the offer of the National Screw & Tack Company. Accompanying the notice was a printed letter bearing the signatures of all the members of the board, giving in detail the proposition of the National Screw & Tack Company that has been tentatively approved and accepted by the board of directors of the Union Steel Screw Company. In this letter the stockholders were informed that all the directors of the Union Steel Screw Company, subject to the approval of the stockholders, had unanimously authorized a contract providing for the sale to the National Screw & Tack Company of all its property of every kind and description, including good will, for the sum of \$461,125, payable in 6 per cent. cumulative preferred stock of the National Screw & Tack Company, and the issue of preferred stock was to be limited to said \$461,000, redeemable at any time at par with accrued dividends, at the option of the purchasing company or issuer of the stock, the stock to be preferred both as to dividends and as to assets. The stockholders were further advised that if the contract was approved, dividends would be paid semi-annually, and that they would realize 85 per cent. on their present holdings, or an amount that would net them an income of five and one-tenth per cent. on their present holdings; and that if the arrangement was consummated, preferred stock would be represented by net assets of the National Screw & Tack Company exceeding in value three and one-half times the par value of the preferred stock. The stockholders were also advised to approve the proposition, for the reason that by the consolidation there would be economy in operation and reduction in cost of output.

At this time the National Screw & Tack Company was engaged in other profitable lines aside from the manufacture of screws or wood screws, and the stockholders of the Union Steel Screw Company were informed in the letter of March 28, 1908, that, "while the directors of the Union Steel Screw Company have been endeavoring for the last two years to take on other lines of manufacturing business, they see no prospect of engaging in anything which will warrant the investment of the necessary capital."

Because of these facts, they cordially recommended the acceptance of the proposition or proposed plan.

At the stockholders' meeting of April 30, 1908, there were 4800 shares represented, out of the entire issue of 5425 shares of stock; and upon the ballot and canvas it appeared that 4800 shares voted in favor of accepting the offer and proposition of the National Screw & Tack Company, and no shares voted against it.

Thereupon the National Screw & Tack Company proceeded according to law, and, in compliance with the agreement, increased its capital stock and issued to the shareholders of the Union Steel Screw Company, in proportion to their holdings, 4610 shares of 6 per cent., cumulative, preferred stock; and, increasing its board of directors from seven to nine, elected two of the preferred stockholders to represent these shareholders on the board, upon which board they have had like representation continuously.

Before this issue of preferred stock, the National Screw & Tack Company had only common stock; and in its articles of incorporation there was no provision for preferred stock. Both common and preferred shareholders have been paid 6 per cent. in dividends on their investment since the date of the absorption of the Union Steel Screw Company. Stockholders' meetings have been held regularly every January or February. At the stockholders' meeting of January 19, 1911, there were present and voting 8823 shares of common and 3831 shares of preferred stock. A resolution was unanimously adopted providing for an increase of \$250,000 of common stock, for the purpose of distributing a 25 per cent. stock dividend to the common stockholders. Similar action to declare a stock dividend of 20 per cent. to the common stockholders was taken January 15, 1913. The necessary legal measures to effectuate these distributions of stock dividends to common stockholders were taken, and stockholders' meetings called as required by law. At all these meetings the preferred stock was well represented, and no objection was made to such distribution of stock dividends.

1916.]

Shlmon v. Screw & Tack Co.

On January 19, 1916, the board of directors declared its purpose to issue or declare a further stock dividend of sixteen and two-thirds per cent. to the common stockholders.

To these distributions and to the proposed distribution of stock dividends no objection has been made or protest entered by any of the persons to whom the preferred stock was originally issued; nor have the directors representing the preferred stockholders on the board ever objected to or protested against these issues, or taken action of any kind to prevent them. At the stockholders' meeting of the Union Steel Screw Company on April 30, 1908, which approved the sale to the National Screw & Tack Company, one man represented, and perhaps largely controlled, ten-thirteenths of all the stock of the Union Steel Screw Company. This gentleman is now and has been a member of the board of directors of the National Screw & Tack Company from the date of the absorption. The minutes of the corporation disclose that he has been almost invariably present at board meetings. He was present at every meeting which declared a stock dividend to common stockholders, and invariably voted in favor of such distribution of stock dividends.

On November 22, 1915, the plaintiff claims he purchased five shares of this preferred stock, and that the same was duly transferred to his name on the books of the company on January 22, 1916. He brings this action, as stated in the brief of his counsel, "to compel the company, in the distribution of the stock dividend declared on January 19, 1916, to recognize the preferred stock, and distribute said dividend equitably as between preferred and common stockholders." In the prayer of his petition he asks for an accounting and disclosure, with a view to equalizing dividends upon both preferred and common stock, and asks that the company be enjoined from proceeding as proposed by its board of directors in January, 1916.

The declaration of claim for relief, as outlined by counsel in their brief, will only be considered, including, of course, the prayer for injunction. There is, then, but one question presented, and that is: Have the preferred stockholders of the

National Screw & Tack Company, in view of all the circumstances herein stated, and in view of the construction they have placed upon the contractual relations existing between them and the defendant, a right to demand, by way of dividend, more than the 6 per cent. provided for in their stock certificate?

In many instances the mere statement of a proposition unerringly points to the answer raised by the issues involved therein. We think the case now before the court falls into this class; and if the answer is not pointedly suggested by the facts as recited, it is because there is lack or want of clarity of statement by the court or a poverty of language to so paint a word picture that a label to identify it would be wholly unnecessary.

As shown by the stock certificate, the preferred stock was entitled to the following rights, privileges and preferences over the common stock:

- (a) The annual, cumulative, 6 per cent. dividend.
- (b) In case of dissolution or liquidation, the preferred stock and accrued unpaid dividends shall be paid in full before the common stock, from assets remaining after liquidation.
- (c) The authorized preferred stock, \$461,000, shall not be increased, nor shall the company's property be mortgaged, without the consent in writing of the holder of at least three-fourths of the preferred stock, or by like vote at a meeting of the preferred stock called for that purpose.
- (d) While the company reserved the right to redeem the preferred stock at any time at its own option, such redemption must be in cash at par, plus accrued dividends, and no less than the whole of said preferred stock shall be redeemed at any time.
- (e) No dividends shall be paid on the common stock, or declared thereon, so long as any dividends are accrued and unpaid on the preferred stock.

With two representatives on the board of directors, to aid in shaping the policy of the company, and keep in touch with its activities, the holdings of these preferred stockholders are as secure as any investment of capital can be under modern industrial conditions.

1916.]

Shimmon v. Screw & Tack Co.

The Union Steel Screw Company was engaged in but one line, the manufacture of wood screws. The panic of 1907 evidently resulted in curtailment of orders and loss of profits. The directorate, after a calm survey of the situation, concluded to "cast anchor to windward" and save, if not a sinking ship, at least one that was unable to breast high-water conditions then prevailing in the financial ocean. Under these circumstances the corporation concluded to sell its plant and assets, including good will, rather than continue in business upon a plainly foreseen possibility of bankruptcy. The stockholders, however, took every possible precaution to secure the ultimate payment of the amount agreed upon, as well as to secure a reasonable rate of interest upon this amount. The provision that the preferred stock might be redeemed at any time, at the option of the purchasing company, clearly indicates that this stock was to be temporary and not permanent. The statutes of this state undoubtedly contemplate that preferred stock may be of a temporary character. The holders thereof are in fact stockholders, and not creditors (*Miller v. Ratterman*, 47 Ohio St., 141). Yet where the right to redeem the stock is reserved, the reservation is based upon its temporary character, and is made as a check against the advantages conferred upon it. In the case before us it will be admitted that while the issue of preferred stock increased the capital stock of the National Screw & Tack Company, still it retained in large degree the character and quality of the original indebtedness which it extinguished (*Mannington v. Railway*, 8 O. L. R., 451). And by virtue of the statutes, or charter and regulations, every Ohio corporation contracts with its stockholders to pay them their pro rata shares of dividends or profits actually earned, and, upon liquidation, their pro rata share of assets remaining after payment of debts. The rights of preferred stockholders are, of course, a matter of contract. When it becomes necessary to determine the precise nature and character of this contract, the whole course of proceeding relating to the issue of stock may be considered as bearing upon the intention of the parties.

The situation, as stated, at the time negotiations between these corporations began, the action taken by them, the letter of March

28, 1908, to the stockholders of the Union Steel Screw Company, the resolutions passed at the stockholders' meeting of April 30, 1908, and the stock certificates, constitute, in our opinion, one and an entire transaction (*Boardman v. Railway*, 84 N. Y., 157). In other words, the stock certificate does not contain or evidence the whole of the agreement, and we may look to the situation of the parties, the surrounding circumstances and all action taken to ascertain the real intention of the parties as expressed in the stock certificates of the preferred stockholders (*Scott v. Railway*, 93 Md., 475); and this is merely a statement of the general rule of construction.

Where the intention of the parties to a contract is not expressly stipulated in the instrument itself, or if there is any doubt as to the intention of the parties, the court, in attempting to arrive at the meaning and intention of the parties, should give great weight to the acts and conduct of the parties, and to the construction and interpretation by them placed upon it for many years continuously after it had been entered into with full knowledge of the questions involved; and it should receive this interpretation, though it may still be opposed to the natural and ordinary meaning of the language used. *Cincinnati v. Gas L. & C. Co.*, 8 C. C., 429.

It has been generally held in this state, "where the language of a contract is ambiguous," or the intention of the parties not clearly stated, that "it is proper for the court to consider the interpretation and construction that the parties themselves have placed upon it, as evidenced by what they have said and what they have done." *M. E. Church v. Water Co.*, 20 C. C., 578.

It is undoubtedly true, as stated by *Cook, Corporations*, Section 269, that "a share of stock is a share of stock, whether preferred or common;" but admitting this to be true, it nevertheless must be conceded that the preferred stockholder may, by contract, waive many if not all of his rights of supervision or participation in profits or dividends in excess of those stipulated in the stock certificate. It is insisted, however, that it was clearly the legislative intent, as expressed in the statutes, that

1916.]

Shimmon v. Screw & Tack Co.

preferred stock should stand on the same footing with common stock, except as it is restricted or limited by the terms of the charter. This claim is predicated upon the assumption that, inasmuch as there are no restrictions or qualifications placed upon the preferred stock in the certificate of incorporation, as provided in Section 8669, G. C., it follows that the National Screw & Tack Company did not intend to limit the dividends of the preferred stockholders to 6 per cent. Counsel evidently seem to forget that when the National Screw & Tack Company was first organized, its certificate of incorporation did not provide for an issue of preferred stock. Its promoters were evidently not under the necessity of using this means of raising the necessary capital for their enterprise. To create discriminations, preferences, restrictions and qualifications upon preferred stock, the articles of incorporation would have to be amended, as provided by Section 8719, G. C., and then only by a three-fifths vote of the stockholders; while the capital stock might be increased by a majority vote of the stockholders, as provided in Section 8698, G. C. Again, the corporation could not increase its capital stock by amendment to its articles of incorporation, as such increase must be made as provided in the latter section.

There is no evidence before the court as to meetings, resolutions and votes thereon of the National Screw & Tack Company relating to the negotiations and purchase of the assets of the Union Steel Screw Company. Whether the purchasing company could secure the requisite vote to amend its articles of incorporation, or not, we are not advised. However, it does not follow that, because it failed to make such amendment, it did not intend to limit the right of the preferred stock to the dividends named in the certificate. The fact that it issued stock dividends only to holders of common stock in 1911 and in 1913, and now again proposes to do so, and the fact that the preferred stockholders not only acquiesced in these distributions, but, through their representatives on the board, and they personally at stockholders' meetings, voted for such distribution, is not only significant of intention, but conclusive evidence that

the understanding and agreement was that the preferred stock was to be limited to 6 per cent. in distribution of dividends. It must be remembered that this preferred stock was not issued, as is usually the case, to provide additional capital, but was really issued to pay a debt. The obligations of the National Screw & Tack Co. were increased, for it should not be forgotten that it was taking over a failing concern. The status of the stockholders of the Union Steel Screw Company was vastly improved by the sale of their plant. Thereafter their investment was not only secured, but they were guaranteed a fixed income on it—fixed in the sense that it could not be varied by profits. They held practically one-third of the capital; and if the corporation made but 2 per cent. profit a year, it went all to them. Not only that, but if there were a failure to make or realize profits for two years, and 6 per cent. were realized the third year, the whole of it would be absorbed by the preferred stockholders.

Again, the corporation could not redeem this stock by calling in portions of it to suit its convenience. No part less than the whole could be redeemed. No more preferred stock could be issued, nor could the company's property be mortgaged without their consent. In the event of liquidation, they had first lien on remaining assets. They took no chances. The common stock took all the chances of financial panics, falling markets, and the squeezing, crushing force of industrial competition.

We must presume that both parties fully comprehended and understood this situation and its possibilities, and that the agreement and understanding was, that the preferred stock should receive the dividend provided in the certificate, and that only.

Aside from this phase of the case, we believe the contract, as expressed on the face of the certificate, does limit the rights of the preferred stock to a 6 per cent. dividend. These certificates provide for a fixed, preferential, cumulative dividend at a reasonable rate; and this, in common fairness, should, if it actually does not, negative any right to further participate in profits. The preferred shareholder contracts for a dividend

1916.]

Shimmon v. Screw & Tack Co.

that the other party to the contract can not change or alter, and which the preferred stockholder must receive if profits are realized. If dividends are earned or profits made, this fixed dividend must be paid. Nor can this payment be passed, as is frequently done with respect to common stock dividends. It is wholly a matter of contract and barter; and we believe that no rule of construction is violated by holding that the entire contract, the whole of it, is expressed in the certificate. To sustain the view of counsel for plaintiff, we must read into the contract language conferring rights and privileges not therein stipulated. The common understanding among men who promote and manage corporations has always been that the preference in preferred stock is given to it by the contract and resolution creating it, and no more; and these rights and preferences are stated in precise and exact words in the certificate, and ought not to be enlarged by holding that there is some magic in the word "share" that even the right of contract can not destroy. When the preferred shareholder receives all that he contracts to receive, and all the corporation agrees to give him, it would seem by every rule of legal exegesis that his right is terminated. There are some authorities which hold otherwise. See *Sternbergh v. Brock*, 225 Pa., 279; 1 *Cook, Corporations*, Section 269; *Beach, Priv. Corp.*, Section 501; 4 *Thompson, Corporations*, Section 3603; *Couse, Ohio Priv. Corp.*, p. 15.

It will be noticed that these authorities, if they may be so termed, are, with but one exception, text-writers. The weight of authority and reason, however, is that preferred stockholders are limited in the distribution of dividends to the amount specified in the stock certificate. See *Niles v. Valve Co.*, 196 Fed. Rep., 994, affirmed, *Niles v. Valve Co.*, 202 Fed. Rep., 141. See also, *Palmer, Precedents*, p. 814; *Will v. Plantation Co.*, 107 Law T. Rep., 360; affirmed in the House of Lords, 109 Law T. Rep., 754. This latter case, decided finally October, 1913, seems to be the latest utterance upon the subject, and presents by far the most illuminative and conclusive reasoning. There are no Ohio authorities upon the subject, and we think for the

reason that no preferred stockholder ever believed that he had a right to participation in dividends other than as declared in his stock certificate, and that he was limited to the amount therein named. The reasoning in support of the contrary opinion is based wholly upon Cook's dictum that "a share of stock is a share of stock, whether preferred or common." See *Cook, Corporations*, Section 269. A horse is a horse, whether gray or black, but each may have its limitations, each may have attributes wholly peculiar to itself. While both are generically alike and have many attributes in common, yet specifically they may be vastly different in power, speed, character and disposition. There is no argument or reason in Cook's dictum. It is only dictum in the sense that it is not the professed, deliberate determination of a court whose judgment will stand the test of rigid critical analysis. A great deal has been said and written concerning the sacred rights of stockholders which modern legislation enacted for their protection has rendered obsolete and irrelevant.

For the reasons given, the prayer of the petition will be denied and the petition dismissed.

1916.]

State v. Vourron.

AUTHORITY TO SUSPEND SENTENCE.

Common Pleas Court of Stark County.

STATE OF OHIO V. CARRIE VOURRON.

Decided, May 4, 1916.

Sentence—Authority to Suspend—Conditional Suspensions—Court Without Jurisdiction After Term—Waiver by Defendant of Right to Apply for Suspension.

1. A court is without jurisdiction to suspend a sentence after the term has passed at which the sentence was imposed.
2. An application for suspension of sentence in order to enable the defendant to prosecute error is a waiver of any right to apply at a later date for an indefinite suspension or a suspension during good behaviour, subject to the terms of probation provided by law.

Oscar Abt, for the defendant, in support of the motion.

A. T. Snyder, Prosecuting Attorney, contra.

MAY, J. (Sitting by designation of Chief Justice Nichols.)

This case comes on for hearing on the motion of the defendant, Carrie Vourron, for a suspension of the sentence heretofore pronounced by the court in accordance with the provisions of Section 13706 of the General Code. The history of the case is briefly this: The defendant was indicted for abortion at the September term, 1914; the case was tried before the Honorable Robert H. Day, in December, 1914, and the defendant was convicted and given an indeterminate term in the penitentiary. The defendant then carried the case on writ of error to the Court of Appeals of Stark County, and in February, 1916, the court affirmed the judgment below and remanded the case to the common pleas court for execution. The Supreme Court of Ohio denied leave to file a petition in error.

This court hears the matter by consent of the trial judge and all parties interested, for reasons which it is not necessary to set forth in this opinion.

Before passing upon the merits of the application it is necessary to determine whether this court has jurisdiction of the question. The defendant in this case was sentenced on the 31st day of December, 1914, at the September term of this court, and the execution of the sentence was afterwards suspended to enable the defendant to prosecute error proceedings to the court of appeals and later to the Supreme Court of Ohio. The court is of the opinion, therefore, that the term at which the original sentence was imposed having passed, it is without power to suspend the sentence. A diligent search of the Ohio authorities on this question enables the court to find only one dictum on this question, and according to that the question is still an open one in this state.

In the case of *Weber v. State*, 58 O. S., 616, the Supreme Court says:

"Cases cited by counsel are to the effect that the suspension may be set aside at a subsequent term; but this case does not require us to go to that extent because here the suspension was set aside at the same term at which the sentence was passed."

It will be noted in reading the Ohio cases that all of them are conditional suspensions, and because of violation of the conditions upon which they were granted the trial judge revoked the original suspension and reinstated the original sentence; so that strictly speaking there is no Ohio case bearing upon the question involved.

Section 13706 of the General Code provides:

"In prosecutions for crime except as hereinafter provided, where the defendant had pleaded or been found guilty and the court or magistrate has power to sentence such defendant to be confined in or committed to the penitentiary * * * and the defendant has never before been imprisoned for crime * * * such court or magistrate may suspend the execution of the sentence and place the defendant on probation in manner provided by law."

Under the rules of practice it seems that the application for a suspension of the sentence imposed by the trial court must be

1916.]

State v. Vourron.

made at the term at which the sentence was pronounced.

In 25 Am. & Eng. Ency. of Law, p. 316, Section b, it is said:

“After the expiration of the term at which the sentence was rendered the court can neither amend it nor vacate it and pronounce a new sentence. Its power in this regard ceases upon the expiration of the term.” And cases cited.

The court is further of the opinion that the motion should be denied for the reason that, under Section 13706, the application for a suspension, even if it is not made during the same term at which the sentence is imposed, should certainly be made before error proceedings are taken by the defendant. The policy of the law as set forth by this section of the code was to discourage litigation and to enable a defendant, if he pleaded guilty or if he were convicted, to throw himself upon the mercy of the court and if all the requirements of the statute could be met by said defendant, the court in the interest of the defendant, as well as in the general interest of justice, should grant a suspension of the sentence; but the court seriously doubts whether the Legislature intended that the defendant should seek to set aside a conviction in the trial court by proceedings in error and then in the event of failure make an application for a suspension of the sentence. Before the days of indeterminate sentence, it was usual for a court to show leniency to a defendant in a criminal proceeding who pleaded guilty, and thus save the county and state the cost of the trial, and in those cases the sentence was always less severe than in cases where conviction was had after trial.

In the case at bar the court is also of the opinion that, when the defendant asked for suspension of the execution of the sentence to enable her to prosecute her error proceedings, such application was a waiver of her other rights to ask for a suspension of the sentence indefinitely, or during good behavior, subject to the terms of probation as provided by law.

However, if the court should be wrong in its conclusion, that it is without power to grant this motion because it is filed after the term at which the original sentence was imposed, the court

is still of the opinion that, if the matter were an open question, the conviction as the record stands was a correct finding by the jury. A careful reading of the record, including the charge of the trial judge, convinces the court that the defendant was given the widest latitude possible in the trial of this case, and that the facts show beyond a reasonable doubt that she was guilty of the offense charged, and that the nature of the offense as well as of the defense put forward by her does not entitle her to any consideration in the matter of this application. The jury undoubtedly believed that her story was a fabrication from beginning to end, and where such a state of facts is shown by the record the case is not such as to appeal to the court for a suspension of the sentence.

Several petitions containing many signatures, including those of prominent citizens of this city, were presented to the court for clemency in this matter. A trial court is not a board of pardons, and while if this court had been sitting in the case and the defendant had pleaded guilty and asked for a suspension of the sentence in the beginning, the court upon the present showing made might have consented to the suspension for the reasons stated, the court is of the opinion that the motion should be denied.

1916.]

Russell .. Bank.

PROOF OF A TRANSFER OF CORPORATE STOCK.

Superior Court of Cincinnati.

JOHN M. RUSSELL, ADMINISTRATOR, v. THE FOURTH
NATIONAL BANK.

Decided, 1916.

Corporations—Admissibility of Entries in Stock Ledger—For Purpose of Showing Transfer of Stock—Possession of Certificate, Unendorsed, Not Conclusive Evidence of Ownership—Waiver of Provision for Endorsement and Surrender May be Inferred, When.

1. Entries, in the stock ledger of a bank of the purchase and sale of bank stock by a one-time stockholder, shown to have been made in pursuance of duty by a deceased clerk, are admissible upon the issue of title to the stock. The admissibility of such entries rests upon the probability of truth in a contemporaneous and regular record, and is not destroyed by the circumstance that the entries are or may become self-serving in character.
2. The possession of a certificate of stock, transferable only by endorsement and surrender, is *evidence* of ownership of the stock described, but such evidence is not conclusive of ownership. The stipulation for endorsement and surrender of the certificate, before transfer of the stock, may be mutually waived by the corporation and the stockholder, and such waiver will be inferred from a regular entry of such transfer in the stock ledger of the corporation, taken in connection with circumstances which make any other inference highly improbable.
3. R in 1865 became the owner of 30 shares of stock of defendant bank, evidenced by stock certificate; for two years he received dividends on the stock, but from 1867 till his death in 1895 he collected no dividends, though dividends were declared semi-annually, and he failed to vote at stockholders' meetings. He suffered a financial decline and died leaving no visible estate. Seventeen years after his death, and forty-five after he was last known as a stockholder of defendant bank, the original certificate, unendorsed, was found among his papers. The certificate provided on its face that the stock was transferable only on the books of the bank upon surrender of the certificate properly endorsed.

The bank records for the period in question are lost or destroyed, save for an old "stock ledger" wherein, in 1865, R is credited with the purchase of 30 shares of stock, and in 1867 is charged with the sale thereof to one "C."

It appearing that the stock ledger was in the handwriting of a clerk or cashier, now deceased, and that it was the duty of the clerk to keep such record,

Held, the ledger entries are admissible on the issue of ownership.

Tuttle & Ross, for plaintiff.

Charles B. Wilby, William Worthington and Clark Wilby, contra.

MERRELL, J.

This case, important in itself, has added interest because it has already been twice reported. The view of this court upon the first trial appeared in 15 N.P.(N.S.), 184, and the converse conclusion of the court of appeals is found in 23 C.C.(N.S.), 1.

Plaintiff seeks to be recognized as the owner of thirty shares of stock in the defendant bank, and to have a certificate therefor, standing in the name of his intestate, transferred to himself as administrator, or, in the alternative, an accounting for the value of such stock and the dividends declared thereon.

The defendant pleads various defenses, which need not be detailed, and by way of cross-petition prays that the certificate of stock in plaintiff's hands be ordered surrendered for cancellation.

The facts are in outline as follows:

In 1865 plaintiff's intestate became the owner of thirty shares of stock of the Fourth National Bank, evidenced by stock certificate No. 123, bearing upon its face a provision that the stock was transferable only on the books of the company upon a surrender of the certificate properly endorsed. This provision corresponded to a by-law of the bank of the same tenor. For two years plaintiff's intestate received the dividends declared upon this stock, but thereafter, although he continued to live in the city of Cincinnati until the year 1888, he received no dividends, did not attend or vote at meetings of the stockholders, nor did he in any way conduct himself or appear as the owner of valuable holdings in the Fourth National Bank or any other institution. During the period of his residence in Cincinnati after 1867, plaintiff's intestate engaged in several business enterprises, none of which seems to have prospered. In fact, the evidence indicates that he suffered a financial decline until in

1916.]

Russell v. Bank.

1888 he removed with his family to Oregon. In his western home he appears to have had little or no means, and at his death in 1895 he left no apparent estate whatsoever. After January, 1867, as appears from the books of record of the Fourth National Bank, the bank recognized W. F. Colborn as the owner of the thirty shares of stock originally held by Russell, and from that time until the present Colborn or his assignees have received dividends declared upon the stock and have voted at stockholders' meetings.

Although, as has been said, Russell in 1895 left apparently no estate, yet in 1912 his son, looking through some of his father's papers in a tin box in the home at Portland, Oregon, found the original certificate No. 123 of the stock of the Fourth National Bank. Aside from this stock certificate the tin box contained no papers of any real value.

Leaving aside all other facts in evidence and assuming for the moment that Russell from 1867 until his death continued to be the owner of thirty shares of Fourth National Bank stock, the extraordinary situation is presented of a man in possession of all his faculties, burdened with family and business responsibilities without adequate means of meeting them, concealing or forgetting for twenty-eight years such a valuable property as this holding of stock in a prosperous national bank.

The certificate of stock is admittedly genuine. It has never been transferred by endorsement upon the reverse of the certificate and there is no living witness who can tell of his own knowledge or even by hearsay what, if anything, was done by Russell with respect to this stock in the year 1867 or at any time thereafter. During the years that followed 1867 the bank declared and paid dividends upon all its stock twice each year, saving one or two short intervals. At certain times during this period, that is, during the period that Russell lived in Cincinnati, notices of annual meetings, also notices of the declaration of dividends were published in Cincinnati newspapers. Omitting certain details of evidence which at best can only throw sidelights upon the situation, the foregoing are the now available facts presented, unless certain entries and particularly one entry in an old stock ledger of the Fourth National Bank can be

permitted some evidential force. This stock ledger, a book of original entry, is the only bank record of the period that has survived destruction or loss.

At the former trial of this cause the stock ledger was received in evidence as to the account in the name of J. N. Russell, and in this account there appeared two entries—one in 1865 charging the bank with the issuance of thirty shares of stock to Russell, and the other in 1867 crediting (as it were) the bank in a like amount and debiting Russell. By other notations in the bank's ledger of that period, the last entry can be traced into the purported issue of the same thirty shares of stock to one W. F. Colborn. At the former trial there was an intimation that Colborn was at that time an officer of the Fourth National Bank, but upon the present trial this misconception has been cleared up, it appearing affirmatively that Colborn was not an officer or director of the bank at the time. In deciding the case as a result of the evidence adduced at the first trial, the court obviously was influenced by this entry in the stock ledger which the court of appeals reviewing the case held to be totally inadmissible, saying:

“Colborn, it is said, was at the time a vice-president of the defendant bank. He was dead at the time of the trial and *no witness undertook to say who made these entries in the stock ledger or under what circumstances or by whose or what authority they were made.*”

And later (referring to the ledger entry):

“It is but a statement of an interested party of advantage to the same party and to the decisive disadvantage of the representative of the other party, but who was no party to the transaction which it purports to narrate. * * * Otherwise spoken it is but the self-serving declaration of an interested party, allowed to be used to the detriment of one in no way responsible for, or acquiescent in it, so far as the record shows.”

At the present trial the entry in the stock ledger was permitted to be offered in connection with proof of the handwriting and of the fact that the person making the entry was dead, and that the book was one which it was the duty of the entrant to keep. In this connection the court was asked to take notice of

1916.]

Russell v. Bank.

the banking laws of the United States requiring national banks to keep a record of stockholders as a basis for their annual report to the Comptroller of the Treasury. Upon the offer of the stock ledger at this trial, the ruling of the court was held in abeyance and the admissibility of the offer is now to be determined.

It is, of course, admitted by counsel for the defendant that this court is bound by the ruling of the court of appeals which has established the law of the case upon the record at the first trial. It is, however, pointed out, as indeed it was made clear by the court of appeals in the language above quoted, that on the former record it was not proved who made the entries in the stock ledger or under what circumstances or by what authority, nor was there any proof that the entries were made in pursuance of a duty and in the course of business by a person since deceased. At the present trial, therefore, the admissibility of the stock ledger is contended for under the "regular entry" exception to the hearsay rule, as formulated in *Price v. Earl of Torrington*, 1 Salk., 285, and illustrated in *Doe v. Turford*, 3 Barnewell & Adolphus, 890, and in a host of English and American authorities coming down to the present day. At this point it may serve a purpose to quote briefly from the opinion of Parke, J., in the latter case. The question was whether a notice to quit served by an attorney and noted by him on a copy of the notice upon his return to his office was admissible to prove service. At page 896, Parke, J., said:

"The real question in the case is whether the entry * * * was admissible in evidence, and I think it was, not on the ground that it was an entry against his own interest, but because of the fact that such entry was made at the time * * * was one of the chain of facts on which the delivery of the notice to quit might lawfully be inferred.

"In this point of view it is not the matter contained in the written entry simply which is admissible, but the fact that an entry containing such matter was made at the time it purports to bear date, and when in the ordinary course of business such an entry would be made if the principal fact to be proved had really taken place."

In argument upon the present case it was insisted that the ledger entry is simply the self-serving declaration of the bank

and is therefore inadmissible. This argument has the apparent sanction of the appellate court which declared—

“it is but the self-serving declaration of an interested party allowed to be used to the detriment of one in no way responsible for, or acquiescent in it, so far as the record shows.”

An analysis of the opinion of the court of appeals shows, however, that the latter was not speaking of entries made in the regular course of business, but solely with regard to the fact that Russell's name appeared upon the books of the bank, first as a stockholder and then as having ceased to be a stockholder. The upper court pointedly says:

“The fact, the mere accident, that the statement appears in writing on the books of the concern does not make it any the less a statement or raise it to any force or dignity above a statement, as seems to be mistakenly supposed in some quarters.”

The last quotation brings up for consideration the suggestion advanced by the defendant that the bank's record of its own stockholders affords some proof or at least a presumption that Russell, having become the owner of thirty shares of stock in 1865 parted with title to that stock to W. F. Colborn and that thereafter Russell ceased to be a stockholder in the bank. This theory is founded upon the notion that the employees of a corporation are not only its agents, but also the agents of a shareholder as to his relations with the corporation. This view finds support in numerous authorities, notably in *Turnbull v. Payson*, 95 U. S., 418, in the head-note of which it is said:

“A person is presumed to be the owner of stock when his name appears on the books of the company as a stockholder; and when he is sued as such, the burden of disproving that assumption is cast upon him.”

This decision has been vigorously, and to my mind, justly criticised. The theory underlying it is, of course, that a stockholder is a member of a corporation and as such, is presumed to know what appears in the corporate records. This presumption, which may properly hold in a case between a partnership and a member thereof, does violence to the facts when applied as

1916.]

Russell v. Bank.

between stockholder and corporation. Accordingly, I find myself in entire agreement with the view of the many text-writers and numerous authorities quoted in the brief of plaintiff's counsel, and very concisely put in the case of *Carey v. Williams*, 79 Fed., 906, wherein it is said that the books of a corporation—

“are not evidence against a stockholder in respect to a contract entered into by him with the corporation notwithstanding he has access to them, because, as to such a contract, he is regarded, not as a stockholder, but as a stranger.”

It was undoubtedly this point of view and this only which the court of appeals had in mind when it declared that “banks are not sacrosanct.”

In the present case there is no evidence independent of the entry in the stock ledger itself tending to prove that Russell knew or assented to the transfer of his thirty shares of stock to Colborn. This at least is true if we except Russell's silence for many years and his failure to collect dividends on the stock or to vote at company meetings. Hence upon the facts of the present case I am ready to conclude that the mere fact that the bank's books show a transfer of Russell's stock to Colborn can not be used against the claim of ownership on the part of Russell or his personal representative. This was, in effect, the whole *ratio decidendi* of the court of appeals in their review of the record at the first trial. An expression of this point of view declaring the law of the case as settled by the court of appeals, makes it unnecessary to consider in detail the numerous authorities collected and presented *pro* and *con* this proposition.

In view of what has been said there should be no difficulty in stating the “law of the case” as established by the court of appeals. Clearly that court did not feel that a basis had been laid in the record before it for a consideration of the Russell entries in the stock ledger as entries made in pursuance of duty in the regular course of business by a person since deceased. Even if the upper court had not made its reasoning entirely plain it would be highly presumptuous on my part to conclude that the reviewing court had held that such an entry was not admissible because of its self-serving character, and thereby declared that to be law which for at least a century has never

been law nor thought to be law. It follows, therefore, that what has been said upon the former review of this case does not in the least settle the question of the admissibility of the stock ledger under the "regular entry" or "shop-book" rule, and this question presents itself for the first time upon the present record.

As already indicated in the recital of the evidence, the conditions precedent to the consideration of the stock ledger as a book entry are all present in the case at bar. If the J. N. Russell account properly comes within the account book exception of the hearsay rule, now for the first time, the person who made the entry and his official connection with the bank is identified, as is his handwriting, and it appears to have been the duty of his position and possibly also the statutory duty of the bank to make such entries. The person who made the entry is dead, and from the apparent regularity of the entry it will now be presumed that the entry was contemporaneous with the fact. As to whether the J. N. Russell account in the stock ledger was such a record as properly falls within the exception to the hearsay rule, there may have been at one time much conflict of opinion and perhaps in certain jurisdictions this conflict still exists. Yet at a very early time such entries were held to be within the rule and it is thought that the better modern practice will include such a case. A case closely analogous was that of *Evans v. Lake*, Bull. N. P., 282, cited in the opinion of *Doe v. Turford*, *supra*. The question there was whether eight parcels of Hudson Bay stock were bought in the name of Lake on his account or in trust for Sir Stephen Evans. To establish the latter position there was admitted a certain "shop-book" of Sir Stephen in the handwriting of his bookkeeper, since deceased, containing an entry of the payment of the money for the whole of the stock. The entry was certainly vital to Sir Stephen's interest, but its self-serving character was thought no impediment to its introduction in evidence. I can not persuade myself that a century after this decision was rendered, the courts of today should be more illiberal in their application of the rules of evidence than the court which first gave form and expression to the rule in question. I therefore conclude that the J. N. Russell account

1916.]

Russell v. Bank.

is, upon the evidence at the present trial, admissible under the "shop-book" rule. This conclusion, it seems almost unnecessary to state, assumes a total absence of independent evidence that Russell knew of the entry or assented to it, the theory being that as the subject-matter of the entry brought it within the line of duty of the person making it, and as after the death of the entrant it will be presumed to have been made contemporaneously, the very existence of the entry is some evidence of the fact which it purports to record.

Before I pass to another phase of the case, something should be said as to the contention of plaintiff's counsel that the admission of such entry as against the personal representative of a deceased person runs counter to the spirit of Section 11495, G. C., providing that "a party shall not testify, when the adverse party * * * is an executor or administrator, etc."

As to this contention, it may be sufficient to suggest that the use of book-account entries is in some instances excepted from the operation of this statute (sub-section 6) and that the disability to testify of a party suing or being sued by an executor or administrator does not extend to the agents of such party. *Cockley Milling Co. v. Bonn*, 75 O. S., 270. If the present case is not within the letter of the statute referred to, no disability should be allowed on purely sentimental grounds or following the "spirit" of the statute. Much learned and lachrymose nonsense is spoken in defense of this statutory rule of evidence by eminent persons who forget that this statute is nothing more than a modern remnant of a medieval rule of law which prevented a party from testifying at all in his own case and that the bar of the statute is more often used by clever counsel to defeat a full disclosure of facts than it is to prevent fraud by the living upon the dead.

Having thus solved the question of evidence left in abeyance at the trial in favor of the admissibility of the stock ledger, it is necessary to consider with some care the probative effect of the entry and in so doing to keep in mind the peculiar characteristics and nature of shares of capital stock.

It is commonplace to say that a share of capital stock is but an aliquot portion of all the rights of the corporate entity. It is

a peculiar species of property, commonly evidenced by a certificate of ownership. Such certificate is not stock but merely a token, however important, of title to stock. With this obvious, but sometimes forgotten, distinction in mind, the question may be considered of what force in the present case is the by-law of defendant bank (printed on its stock certificate) reciting that its stock is "transferable only on the books of the bank * * * upon surrender of this certificate"?

For the defendant it is contended that this provision was primarily for the benefit and protection of the bank, and might be waived by it any time, of course, at its peril; for the plaintiff it is said to be equally for the protection of the stockholder. Both points of view are tenable and perhaps sound. Even so, it is open to both the corporation and a stockholder to waive jointly their respective protections. To hold otherwise would be to confuse the stock and the certificate representing it.

In the present case there is no direct proof of such mutual waiver, and only, through the stock-ledger, inferential proof.

The stock-ledger, admissible under the "shop-book" rule, is some evidence that Russell, having been a part owner of the bank and as to such part ownership in "account" with the bank, in 1867 squared the account by ceasing to be such part owner. It was entirely possible for Russell to have become the owner of bank stock without ever receiving a certificate of stock and to sell his stock and pass title thereto without having a certificate to endorse. If, as in this case, he possessed a certificate, he might also sell and transfer title to his stock without presenting or endorsing the certificate if the bank consented to such course.

The stock-ledger with its entries in the Russell account is some evidence that in 1867 Russell ceased to own the bank stock—that in that year, the bank having had an account with Russell as a stockholder, ceased to be chargeable on this stock-account. The ledger entries are therefore probative of the bank's defense. They are, however, apparently contradicted by plaintiff's possession of what the upper court calls a "very matter-of-fact stock certificate."

1916.]

Russell v. Bank.

Does this conflict of evidence leave the balance even between the litigants or outweigh on the side of the present plaintiff? This is the ultimate question in the case.

In weighing conflicting evidence, at least two considerations are proper and important. First, the probative effect of the evidence should be analyzed, and, second, the comparative reasonableness or probability of conflicting conclusions should be taken into account.

Viewing the evidence in the former aspect, the ledger entries tend to prove that Russell ceased to be a stockholder on the date of the last entry. Unless a tortious intent on the part of bank officials is assumed, no other conclusion is inferable.

On the other hand, the possession by Russell (or his administrator) of the stock certificate, has, at first glance, a probative tendency exactly the opposite. In truth, however, the retention by Russell of the certificate is not inconsistent necessarily with his having sold the stock. What is more important is that the book-entry, assuming its honesty, speaks of the ownership (or change in ownership) of the *stock itself*, whereas possession, however honest, of the certificate merely indicates, but does not necessitate the conclusion that Russell continued the owner. Plaintiff's possession of the bare *indicia* of title may be rationally accounted for on the theory of temporary loss of the certificate, but the ledger entry can only mean that the title to the stock passed, or that former officials of the bank deliberately falsified their records for no personal gain, but in a crude attempt to destroy the holdings of one stockholder for the benefit of another.

When faced by such conflicting conclusions, it is entirely proper to apply the test of reasonableness. Viewing the case from this aspect, it is easy to believe that bank officials consented to a transfer by Russell of his own stock without insisting upon a production of the stock certificate. To speak of such a course as careless or unwise is altogether just, but to brand it as a violation of law and a wrong to the stockholder presumably accommodated thereby, is to torture the sense of plain words.

Again, taking the known facts from Russell's view-point, how account for his reticence of a quarter-century, in the face of a progressive financial decline, if indeed he knew himself entitled to this valuable holding of stock. It was suggested at another stage of this litigation that it is a trick that misers have to appear to live poor while they are getting ready to die rich. Assume that Russell was a miser—an assumption that the evidence flatly contradicts—is it also a trick of misers to permit their rich dividends to lie unclaimed? Or receiving none for many years, to make no inquiry therefor?

Mere supposition or conjecture has no place in the direct processes of legal inquiry, but conclusions based on evidence are rightly tested by the inherent probabilities of the case. My conclusions from the evidence, tested by the probabilities of the present case, is that Russell's administrator holds the naked token of ownership in stock, the title to which passed to another in 1867. The certificate of stock, having long ceased to represent title, should therefore be canceled or delivered up.

Having stated, perhaps too fully, the grounds of my conclusion, I take no notice of other defenses pleaded by the defendant bank.

The petition will be dismissed, and the prayer of the cross-petition granted.

SALOON LICENSE NOT SUBJECT TO EXECUTION.

Common Pleas Court of Cuyahoga County.

**JEREMIAH HARRIGAN V. ALBERT MENDELSON, RECEIVER OF THE
SOUTH CLEVELAND BANKING COMPANY.**

Decided, June 24, 1916.

*Execution—Saloon License Not Property But a Mere Privilege—Not
Subject to Levy and Execution.*

A saloon license is not personal property, in this state, in the sense that it is subject to levy and execution.

Cline & Minshall, for plaintiff.

Mathews & Orgill, contra.

1916.]

Horrigan v. Mendelson.

LIEGHLEY, J.

Plaintiff filed his petition in this court praying for an injunction against the levy of an execution by defendant on the liquor license owned by plaintiff, the said defendant being a judgment creditor of plaintiff. To this petition a demurrer has been filed, and the sole question presented for decision is, whether or not a liquor license, duly issued under our license law, is property of such character and kind as may be levied on by the sheriff.

Section 11655, G. C., provides as follows:

“Lands and tenements, including vested interests therein, permanent leasehold estates renewable forever, and goods and chattels not exempt by law, shall be subject to the payment of debts and liable to be taken on execution and sold as hereinafter provided.”

If a liquor license is property, it is necessarily included in the terms “goods and chattels.” In substantially all the cases that have had to do with an interpretation of this section in Ohio, the articles or goods and chattels were tangible. It has been held that authorized but unissued bank notes are not subject to levy. Also it has been held that authorized but unissued bonds are not subject to levy. The statute particularly prescribes the manner in which certificates of stock may be subjected to the payment of debts.

Our liquor license law is found in 103 Ohio Laws, 216-243. It provides that a license shall, when granted, run for a period of one year, for which the applicant pays the sum of \$100. The business conducted under the license pays to the county treasurer \$1,000 per year, under Section 6071, G. C. A license is granted to one who has the qualifications prescribed by the act, and the liquor license board is the final arbiter of the question of whether or not the applicant possesses the qualifications. Section 29 of the act provides for the revocation of a license, and Section 35 provides for the transfer of a license.

The leading authorities supporting the claim of defendant on demurrer that said license is property may be found in the following citations: *Woollen & Thornton on the Law of Intoxicating Liquors*, Section 420; and 41 Washington, 385.

An examination of these authorities will disclose that the question of whether or not a license is property is determined by the fact of transferability or non-transferability of said license. The Washington case was one in which a municipality licensed a saloon-keeper, for the sum of \$1,000, which was paid in advance, for the term of one year. Shortly after the term began to run a creditor attached all the property of the firm. There remained about \$900 of the license money unearned. It was held under those circumstances that the license was property, although the purchaser at the sale of said license, or transferee, required the consent of the municipality. It may be urged in this connection that the \$900 unearned, but paid, presents a different situation from a license in the state of Ohio for which the sum of only \$100 is paid, and the \$1,000 assessed under Section 6071, G. C., against the business, which may be paid in installments. Or, if paid in full, a refund is provided for, in the same section, of a sum in proportion to the time the business is not conducted.

Section 35 of the act provides that a licensee may apply to the license commissioners for a transfer, upon the payment of a fee of \$50; and if the transferee be found possessed of the necessary qualifications under the act, the commissioners *shall* endorse on the license, "Transferred to ———." But it will be noticed that the commissioners, after all, are the final arbiters of the subject of qualifications. This same licensee may prefer to surrender his license, and then he obtains a refund, under Section 6071, G. C.

It has been suggested that the act itself clothes the license with the essentials of property, by the fact that in the event of bankruptcy of the licensee the license shall become the property of the trustee. Also, that in the event of the death of the licensee, the license shall become the property of the administrator.

If the intention of the Legislature is to be gathered, from these two facts in the event of death or bankruptcy, that the license is property, then why should the act itself go into the manner of disposition of the license under these contingencies with so much particularity? If it was intended by the Legis-

1916.]

Horrigan v. Mendelson.

lature that the license should be property, the act might have provided for it in a few words; or if the license was to be regarded as property, it was entirely useless to provide for the same passing to the trustee or administrator. If the license is property, it would have to pass to the trustee in one case and to the administrator in the other, without any provision therefor in the act.

The authorities supporting the contention of the plaintiff that the same is not property subject to levy on execution may be found in the following: *Woollen & Thornton on the Law of Intoxicating Liquors*, Sections 124, 325 and 326; *Black on Intoxicating Liquors*, Section 130; and 9 N. W., 560.

These authorities support the proposition that the license is a personal privilege by the state, and is an intangible privilege; that it is a method adopted by the state, in the exercise of its police power, to regulate and control the liquor traffic, subject to modification and alteration, in the reasonable exercise of that power, at any time.

Much has been claimed for the fact that a license in Cuyahoga county has considerable value, and that, therefore, the creditors of a licensee should not be deprived of the right to subject the same to the payment of their debts. This fact, however, should not be the controlling consideration. The law of supply and demand here creates this local value. There are counties in the state where licenses are not held at such a premium as here. If this argument were considered determinative, then we would have in Cuyahoga county goods and chattels of considerable value, and the same goods and chattels in other counties of no value.

If this license is property, then it must be concluded that the Legislature, in enacting this law, intended to *create* property. Suppose A, indebted to various persons upon pre-existing debts, should be granted a license next November, then immediately upon the issuance of the same to him the pre-existing creditors may begin proceedings to, and in fact may, subject said license to the payment of those debts, and the Legislature thereby created property by which the pre-existing creditors of A were satisfied. The personnel of the licensees would thereby be con-

stantly interfered with, and to that extent the exercise of police power of and by the state disturbed. The act does not even expressly make the license answerable for debts incurred in the conduct of the business. If it had been so intended, a very few words would have expressed the intention. Only when a transfer is allowed, is a list of creditors of the licensee required. Theretofore the creditors have security in the stock of goods and the fact of a going concern.

Again, looking at the situation from another angle, suppose a levy is made upon a license, and the sheriff thereafter is called upon to sell the same in the performance of his duty; he then undertakes to sell a thing that he can only conditionally sell and only conditionally deliver. Suppose the sale is made, and subsequently the commissioners find the purchaser disqualified under the act, then the situation would require another advertisement and sale, and so on, until finally a purchaser would be found who qualified under the act. If the sheriff is obliged to sell unconditionally, he can not unconditionally deliver property; he simply sells to the purchaser the right to stand in the shoes of a transferee before the commissioners.

It seems to me that to hold that the license is property presents many anomalous situations. It is not clothed with those essentials of property which all definitions thereof require, or the definitions of goods and chattels require.

The policy of our state in respect to this question has not yet been declared by any of the superior courts. The question is squarely presented to me, and necessitates a decision by me. In view of the conflicting authorities, it has been a difficult question; but it seems to me that the safer and sounder policy to adopt is in conformity with the authorities which hold that a liquor license, duly authorized and granted under *our* statute, is a mere privilege, and is not property subject to levy on execution.

For the reasons above stated, the demurrer is overruled.

1916.]

Minnich v. Lutz et al.

**ILLEGAL ERECTION AND MAINTENANCE OF SCALES IN
A PUBLIC STREET.**

Common Pleas Court of Logan County.

B. FRANK MINNICH ET AL V. SARAH C. LUTZ ET AL.*

Decided, February 21, 1916.

*Municipal Corporations—Without Power to Authorize the Placing of
Wagon Scales in a Public Street for Private Benefit—Scales Placed
in the Street Create a Nuisance, When.*

1. A municipal council is without authority to grant the right to place wagon scales in a public street for the benefit of an abutting owner or any private interest.
2. Where scales so placed in the street obstruct the gutter and cause surface water to collect and become stagnant, foul and to give rise to offensive odors, and interfere with ingress and egress of abutting property owners, teams drawing loads to be weighed and using the untraveled part of the street increases the amount of mud in wet weather and dust in dry weather, of litter and refuse which accumulates in the street, a nuisance is created against which injunction lies.

HOVER, J.

B. Frank Minnich and Myrtle Minnich, on the 9th day of July, 1915, filed their petition against Sarah C. Lutz and W. P. Lutz, claiming in substance that on the 12th day of July, 1915, the plaintiffs bought a certain part of a lot known as Lot No. 35 in the village of Lake View, Ohio, from Alex Miller; that in front of said lot stands a wagon scale in the street, and that plaintiffs purchased from said Miller all his right, title and interest in said wagon scales; that on or about the 16th day of July, 1915, defendants wilfully and maliciously and without any right on their part, and with no permission from plaintiffs, did tear away part of said scales, being the north cement wall, thereby allowing the pit under the scales to become filled with wash and rubbish so that the scales will have to be torn up and

*Affirmed by the Court of Appeals of the Third District, June 29, 1916, except that all costs should be paid by the plaintiff.

rebuilt, all to the damage of plaintiffs in the sum of one hundred and fifty dollars.

W. P. Lutz files his separate answer and says in substance that he denies that he wilfully and maliciously, and without any right, tore away part of said scales or otherwise mutilated or destroyed them; that he together with his family occupy for their residence a house and lot adjoining plaintiffs' on the north, and that defendants' family reside within twenty feet of the gutter running north and south in front of their said dwelling; that on or about the 3d day of May, 1912, the village council of Lake View passed an ordinance authorizing the construction and maintenance of said scales on said street, providing no interference with the use of street resulted; that when said scales were put in, a cement wall for the pit was so constructed that it extended across the gutter in front of plaintiffs' premises and obstructed the flow of the water and blocked the gutter, causing a pool of water to stand and remain, becoming stagnant and foul in front of his said dwelling; that on or about the 16th day of July, 1915, to permit the stagnant water and filth to drain off, he drilled a hole in said cement wall and not doing any unnecessary damage, thereby permitting the stagnant water and filth to be drained off through the gutter; that on the 24th day of June, 1915, by action of the town council of the village of Lake View, said cement wall was declared a nuisance; that by reason of said scales being constructed across the gutter of the street said village ordinance permitting the location and maintenance of the scales was violated in that it interfered with the free use of the street; that the village council has no authority to permit the streets to be obstructed by erecting wagon scales therein for private use, and that said ordinance is void and illegal.

Sarah C. Lutz, by leave of the court, has filed her separate answer, wherein she denies the allegations of the plaintiffs' petition, after admitting that plaintiffs are the owners of the real estate described in the petition and the wagon scales and that plaintiffs acquired some right to said scales by virtue of an agreement with R. M. Meredith, a former owner; that she is the owner of the lot adjacent to the lot of plaintiffs as described

1916.]

Minnich v. Lutz et al.

in the petition, wherein she with her husband and family dwell, and after describing the conditions caused by the scales obstructing the flow of the water in the gutter, alleges that said scales are a nuisance, and prays for a decree of the court that said scales and wall are a nuisance and that by mandatory order the nuisance be abated.

Plaintiffs file a reply to the answer of W. P. Lutz and after denying the allegations contained in the second and third defenses, that the scales and walls are a nuisance, aver that the village council required defendants to construct a curb and gutter, which they refused to do; that these plaintiffs have offered and now renew the same, to put in a drop on the north side of said wall in the line of the gutter and thereby take care of the surface water that would otherwise gather in front of defendants' premises; that an escape for the water under the scales has been provided, which effectually disposes of the water gathered under said scales. Wherefore, plaintiffs renew their prayer for judgment.

By agreement, a jury was waived and the case was submitted to the court on the evidence.

The evidence shows that the village council, on the 3d day of May, 1912, passed an ordinance authorizing Alex Miller and his assigns to construct and place a wagon scale on South Main street of Lake View, Logan county, Ohio, as follows:

"Section 1. That Alex Miller is hereby given the right to construct and maintain a pair of wagon scales on South Main street in Lake View, Logan county, Ohio, in front of in-lot No. 35 in said village of Lake View, Ohio, for a period of ten years; said scale to be constructed along the curb line of said street in front of said premises in such a manner as not to interfere with the full use of said street by the public.

"Section 2. When the use of said scales are discontinued, they must be removed from the street and the same be put in good repair.

"Section 3. This ordinance shall be in full force and effect from and after its passage, approval and due course of law."

Plaintiffs bring this action for damages and for restraining order. The defendants answer and attack the authority of the village council to grant such a privilege as this in the first in-

stance, claiming the right by virtue of the ordinance to locate the scales in the street is null and void; that the scales are a nuisance, and pray for the abatement of the same.

Section 3714, General Code, provides:

“Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation and shall cause them to be kept open, in repair, and free from nuisance.”

“Streets and highways belong to the state and are under its control; but the state has seen fit to place the streets of a municipality under the control of the municipal authorities thereof, as agents of the state, in preserving the public rights in such streets; and the municipal corporation holds the fee, subject to the right of the state to direct the method wherein such trust shall be administered and subject to the duty of keeping the streets in repair and free from nuisance.” *Reynolds v. Cleveland*, 20 C.C.(N.S.), 139, affirmed by Supreme Court, 76 O. S., 619, without report.

The municipal authorities are agents of the state. As such it is the duty of the municipality to preserve the public right in the streets. The streets and highways belong to the state.

“A municipality has the right to determine the width of its streets which shall be devoted to lawful public uses, devoting a part to sidewalk, a part to lawn and shade trees, a part to necessary poles for public lighting, etc., a part to drainage, gutters, etc., and a part to vehicles and street cars; and it is not an unlawful use if that part of a street which is usually devoted to drainage be occupied in part by poles supporting street lights.” *Norwalk v. Jacobs*, 9 O. C.C.(N.S.), 153.

The right of municipal authorities to grant the use of streets to water, gas, and electric light companies, transportation, telegraph and telephone companies, and for many other public service corporations, is well settled and need not be discussed here.

“Public streets, squares, landings, and grounds are held in trust for the public, and being so held they are for the use for

1916.]

Minnich v. Lutz et al.

which they were dedicated or acquired and subject to the property rights of the abutting owners, under the absolute control of the legislative power of the state." *R. R. v. Cin.*, 76 O. S., 481.

The case of *Branahan v. Hotel Company*, 39 O. S., 333, was a case where the city of Cincinnati by ordinance authorized the use of Central avenue to Fourth street as a hack stand. Complaint was made that the hacks prevented full enjoyment of the use of abutting property owners. The court in the opinion say:

"The city is clothed with power over the streets, and is charged with the duty of keeping them open for public use and free from nuisance. It may enlarge these general public uses without infringing the rights of the adjacent owner, but where additional burdens are imposed, even for a public purpose, which materially impair the incidental property right of the lot owner, equity will enjoin, until compensation is made.

"This ordinance granted a permanent use of the street for mere private uses.

"As well might the city authorities authorize permanent booths or structures for the use of dealers in the various articles of trade. Having no rent to pay, the occupants could accommodate the public at better prices.

"The supervision and control of the public highways of a city is a public trust, and while additional uses may be imposed not subversive of or impairing the original use, such as laying down gas and water mains, yet the right of the public to use it as a street, and of the adjacent lot owner to enjoy it as the means of access to his property, can not be materially impaired.

"The city has the right to regulate hackney coaches and also the right to appropriate private property for the use of the corporation, but it has no power to appropriate the easement of an adjacent lot owner to a mere private use."

The grants of a city or village to use the streets are limited to the authority granted the city or village as the agent of the state by the Legislature.

"Every grant in derogation of the right of the public in the free and unobstructed use of the streets, or restrictive of the control of the proper agencies of the municipal body over them, or of their legitimate exercise of their powers in the public interest, will be construed strictly against the grantee, and liberally

in favor of the public, and never extended beyond its express terms when indispensable to give effect to the grant." *Railroad v. Defiance*, 52 O. S., 262.

There is not a reported case in Ohio where the grant of a municipal council to erect and maintain scales in the street has been upheld; nor has the court been able to find a reported case in our state where such grant for a similar or equivalent purpose has been upheld. The exercise of this power has been limited to public service, and to abutting property owners in a very limited way, such as space for displaying goods, taking in coal, extending steps from buildings, and such minor rights limited to close proximity to the abutting property line.

Neither is there a case cited by counsel in their briefs on either side of this controversy where the question of the right to locate and maintain wagon scales in the street has been passed upon, and the court has not found an Ohio case on this point. However, there can be no question that such right can not be granted and maintained when the grant interferes with the complete power and control of the municipal authorities, or when such right interferes with the use of the street by the public or the enjoyment of the property of an abutting property owner.

We are not without authority on this subject, to a certain extent, in other states and it may be said in this connection that not one case on this subject has been found in any state where the grant of the privilege to erect and maintain private scales in the public highway has been sustained by the courts, while it has been held that a city can not authorize the construction of scales in a street for the benefit of a private individual. *City of Tell City v. Bidefeld*, 20 Ind. App., 1; *Berry Horn Coal Co. v. Scruggs-McClure Co.*, 62 Mo. App., 93; *State v. Stroud* (Tenn. case), 52 S. W. R., 697.

If one man has the right to use the street as a place of business, all men have the same right. This could not be granted. The state would lose control of the highways and the rights of abutting property owners would be set at naught. The granting by municipalities of such private rights in public property is against public policy.

1916.]

Minnich v. Lutz et al.

Leaving the question of the right of the village council to grant such a privilege for the present and taking up the question of nuisance:

Defendants claim that by reason of the cement wall for the scale pit on the north side extending across the gutter line, the water is stopped and caused to collect to the depth of fourteen or more inches, carrying with it filth from the street; that it becomes stagnant and foul, causing a stench endangering the health of himself and family and preventing the full enjoyment of his property.

The evidence proves substantially this condition. The evidence shows that the village council was of the same belief as defendants, when on the 24th day of June, 1915, the record of the council proceedings shows that this pair of scales in the street was declared a nuisance. This record does not make the scales a nuisance, but is evidence tending to prove that the presence of the scales as then located was not considered beneficial to the public interests. The record shows that this action was taken by the council on the petition of W. P. Lutz, S. C. Lutz, Andy Wright, Prior Cummons, W. A. Stroby and Lawrence Sanders.

It is claimed that the plaintiff is willing to put in a drop on the north side of the wall at his own expense, permitting the water to flow under the scales and thereby make its escape.

This statement of plaintiff is not received with so much weight and credibility as the court would be pleased to give it under other circumstances. Plaintiff was informed of the unpleasant and objectionable features of the scales before he purchased the lot including the scales, and was also informed that he would have legal trouble if he acquired the title to the scales and left them there.

Notwithstanding, he purchased the scales in the face of the fact that the town council had passed a resolution condemning them, and of which fact he was informed, but this is not all. In the summer, on or about the — day of July, 1915, defendant, W. P. Lutz, took his ax and knocked out a triangular piece of cement wall about eighteen inches deep and let the stagnant, filthy water flow away. Plaintiff applied for and procured an in-

junction against defendant, restraining him from interfering with the scales or in repairing them. Had plaintiff in good faith wanted a drop in the gutter, then would have been a good time to put in, but instead of so doing, he rebuilt the wall tight and strong, so that the previous annoying conditions would necessarily continue to exist.

Without going into a lengthy discussion of nuisance, public and private, the finding of the court is that the scales are in the street without authority and that the village council is without authority to grant the privilege or right to erect scales for the benefit or private interests in the public highway; that the scales interfere with the proper use of the highway in that they prevent proper drainage of the water therefrom, to the annoyance, discomfort and hindrance to the public in its right to full and unobstructed use and enjoyment of the highway; that the presence of the scales in front of the residence of defendants, with the necessary unpleasant conditions caused thereby, will continue unless abated, is apparent.

The presence of the teams standing on the side of the street out of the traveled path of the road, cutting the ground into mud when soft, and beating it into dust when dry, to say nothing of the condition of the gutter caused thereby, when driving on and off of the scales to weigh loads, and the damming up of the water in the gutter, preventing ingress and egress, creates a condition repulsive to contemplate.

"A nuisance may be: first, private, as when one so uses his property as to damage another or disturb his quiet enjoyment of it; or, second, public or common, where the whole community is annoyed or inconvenienced by offensive acts, as when one obstructs a highway or carries on a trade that fills the air with noxious and offensive fumes." *Cardington v. Fredericks*, 46 O. S., 446.

By authority of this decision, the scales are both a public and private nuisance, as the law as expressed in the opinion of that case is that: "The general accepted rule is, that although the nuisance be a public one, yet it is private also, if an individual sustain injury thereby, and he may maintain an action and re-

1916.]

Palmer v. State.

cover his special damage, whether it be direct or only consequential."

The court does not approve nor find sufficient authority for the use of the ax in abating an actual or fancied nuisance, but there are some mitigating circumstances that should be considered. The undisputed testimony is that defendant, W. P. Lutz, sought the advice of the board of health, some village authorities and county authorities, all of whom advised him to make a hole in the wall and let the water drain away. He was probably willing to act on this advice, for the reason that it was free and for the additional reason that the summary action afforded prompt relief.

The finding of the court is that the scales complained of are a public and private nuisance and it is ordered that the nuisance be abated within thirty days by removing the scales from the street or highway, and that there be a hole made in the north wall deep enough and large enough to drain all the water from the gutter within five days from this date; that the street be left in a smooth, safe and finished condition.

The petition of plaintiffs is dismissed and judgment against W. P. Lutz for five dollars costs; judgment against plaintiffs for the balance of the costs.

**SERVICE UPON THE STATE IN AN ACTION ON ACCOUNT OF
OVERFLOW OF WATER FROM CANAL
SYSTEM.**

Common Pleas Court of Mercer County.

ALBERT PALMER, FOR HIMSELF AND OTHERS, v. STATE OF OHIO.

Decided, April 25, 1916.

Actions Against the State—Recent Constitutional Amendment Providing for—Is Not Self-Executing and Requires Further Legislation—Right Conferred Without a Remedy—Claims Against the State for Damages from Overflow of the Canal System.

1. The amendment to Section 16 of Article I of the Constitution adopted September 3d, 1912, providing that, "suits may be brought against the state, in such courts and in such manner, as may be provided

by law," is not self-executing and requires ancillary legislation to give it effect, and until this is done the amendment is inoperative and confers a mere right without a remedy for the enforcement thereof.

2. Sections 455 to 468 inclusive of the act of March 6th, 1913 (103 O. L., 125), authorizing the superintendent of public works to appoint three commissioners to consider claims against the state for damage to private property on account of the overflow thereof by water from the canal system, do not provide a remedy by suit against the state within the meaning of the amendment.

I. F. Raudabaugh, John Romer and S. S. Scranton, for plaintiffs.

Edw. C. Turner, Attorney-General, and *C. R. Bell* of counsel for defendant.

BOWMAN, J.

This is a suit against the state on a claim for damages on account of waters of the canal system thereof negligently overflowing plaintiff's lands.

Service was obtained by issuing a summons directed to the sheriff of Franklin county, which was duly served upon the Governor at Columbus, in said county.

The case is now submitted to the court on the motion of the Attorney-General to quash the service for the reason that the issue and service of summons against the state is not authorized by law.

That a sovereign state can not be sued in its own courts or in any other court without its consent is an established principle of jurisprudence. Not that there is no liability and no claim, but that there is no remedy; not because of freedom from liability, but lack of a tribunal in which to show and enforce the liability. *Coster v. Mayor of Albany*, 43 N. Y., 408; *Ohio, ex rel. v. Board of Public Works*, 36 O. S., 415. It may, however, waive this privilege and permit itself to be sued by individuals. *Beers v. Arkansas*, 20 How., 527, 529; *Hans v. Louisiana*, 134 U. S., 13, 17; *North Carolina v. Temple*, 134 U. S., 22.

It must be conceded, that such consent was given by the amendment to Section 16 of Article I of the Constitution adopted September 3d, 1912, which provides that:

1915.]

Palmer v. State.

“Suits may be brought against the state, in such courts and in such manner, as may be provided by law.”

It is urged, however, that the Legislature has not provided in what manner, nor in what courts, suits may be brought against the state, and that until it does so, the suit can not be maintained. In other words, that this amendment to the Constitution is not self-executing, but that legislation is necessary to give the same effect.

While prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void, affirmative self-executing provisions may be found in every modern constitution, and require no legislation to put them into operation, but as said by Mitchell, J., in *Willis v. Mabon*, 48 Minn., 140, speaking for the court at page 150:

“The question in every case is whether the language of the constitutional provision is addressed to the courts or the Legislature—does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect?”

Or, as said by Ramsey, J., in *State v. Harris*, 74 Oregon, 582:

“Constitutional provisions are self-executing where it is the manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty or a liability imposed.”

In Cooley on “Constitutional Limitations” (7th Ed.), 121, the author says:

“A constitutional provision may be said to be self-executing if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed enforced, and it is not self-executing when it merely enacts principles, without laying down rules by means of which those principles may be given the force of law.”

Conceding that this amendment should be so construed as to give effect to the intention of the framers and the electors who

adopted it, and that they should be taken to have intended what the language used means, and that the right is thereby given to sue the state, the language employed would indicate that the courts in which such suits may be brought, and the manner thereof, are not determined nor provided thereby but are to be referred to the Legislature for action.

While the judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and courts of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law, the amendment does not provide that courts as present established shall have jurisdiction to entertain suits against the state, or if so which thereof, but such courts only as may be provided by law. If in such courts only as may be provided by law, it is made the duty of the Legislature to establish courts to entertain such suits, or to confer at least such jurisdiction upon some one or more of the courts now established.

So, too, existing provisions of the code of civil procedure as to the manner of such suits shall not apply and govern unless so provided by law. It is not left to the plaintiff to select the court in which to sue the state, nor the manner thereof, and until the Legislature has provided both, the right to sue the state conferred by the amendment is a mere right without a remedy for the enforcement thereof.

The amendment is not, therefore, self-executing and complete in itself, but permissive only and dependent on the action of the Legislature to put it into operation. Not only does it not execute itself, but it does not furnish the courts with any means of executing it. It is a mandate to the Legislature and does not become effective until legislative action. It contemplates subsequent legislation in its aid to make it operative and to give it effect, and until this is done, it is not in the power of the court to give it effect. It is apparent, therefore, that the amendment was addressed to the Legislature and not to the courts.

These provisions of the amendment as to what courts and the manner in which suits may be brought against the state can not be cast aside as so much "dead wood." We must presume that the framers and the people who adopted the amendment, must

1915.]

Palmer v. State.

have inserted these provisions with a clear vision of a fixed purpose which we can not disregard.

If to make the amendment dependent on the action of the Legislature is to make it subject to be defeated by the inaction of an unfriendly Legislature, it was within the power of the people had they so desired, to have so framed it as to require no legislation to put it into operation, but failing to do so it is not for the courts to give it effect without such legislation, and such failure would be a wrong for which there is no judicial remedy. *Chicago, etc., Ry. Co. v. State*, 53 Wis., 513.

That a constitutional amendment providing that "suits may be brought against the state in such manner, and in such courts, as shall be directed by the law," confers a right simply to prosecute a claim against the state, but that no such suit may be brought thereon until the Legislature has established courts for that purpose, or authorized those established to entertain jurisdiction, and likewise providing for the manner of such suits, see, *Galbes v. Girard*, 46 Fed., 500. To the same effect, in cases involving similar constitutional provisions, see, *Beers v. State*, 20 How. (U. S.), 527; *Oil Co. v. Crain*, 117 Tenn., 82, 89; *State v. Mortensen*, 69 Neb., 385, 386; *State v. Yount*, 7 Neb., 101; *Chicago, etc., Ry. Co. v. State*, 53 Wis., 509, 513; *Northwestern, etc., Bank v. State*, 18 Wash., 73; *Tate v. Salmon*, 79 Ky., 543; *Commonwealth v. Haly*, 106 Ky., 716, 718.

It is confidently asserted, however, by counsel for the plaintiffs, under authority of *Chisholm v. Georgia*, 2 Dallas, 419, that until the Legislature provides differently, existing laws should control as to courts having jurisdiction of such suits, and the manner thereof, and that service of process on the Governor or Attorney-General is sufficient service on the state.

The question, however, before the court in that case was not whether the state courts have power to entertain suits by individuals against a state without its consent, but whether a state may be sued in the federal courts by its own citizens, and as said by Bradley, J., in *Hans v. Louisiana*, 134 U. S., 11, the decision created such a shock of surprise throughout the country, that at the first meeting of Congress thereafter, the eleventh amendment to the Constitution was almost unanimously adopted,

and in due course adopted by the legislatures of the states, and that "this amendment expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually *reversed* the decision of the Supreme Court."

Claim is made by counsel for the state, that Sections 455 to 468 inclusive of the act approved March 19, 1913 (103 O. L., 125), were enacted in obedience to said amendment to the Constitution and to make it operative and effective, and that specific provision is made therein for determining claims for damage to private property on account of overflowing their property by the waters from the canal system of the state, and that such provision is by its terms exclusive.

The provision is for the superintendent of public works to appoint three commissioners to consider such claims, with power to examine property injured, hear testimony and award the claimant such damages as they deem just, and which award shall be submitted to the General Assembly and payment to be made from moneys exclusively appropriated for that purpose.

Is this a remedy by suit against the state within the meaning of the amendment? If so, it is exclusive; otherwise not. The amendment contemplates a suit in court. In legal phrase, a suit is the prosecution of some claim, demand or request in a court of justice. *Callen v. Ellison*, 13 O. S., 453; *Railroad Co. v. Larwill*, 83 O. S., 116; *Weston v. City Council of Charleston*, 2 Peters (U. S.), 464.

Now a court of justice is a tribunal empowered to hear and determine questions of law and fact, either with or without a jury, upon pleadings, either oral or written, and upon evidence to be adduced under well defined and established rules according to settled principles of law.

Applying this principle to the claim that the remedy provided by said act is exclusive, it is not difficult to come to the conclusion that the amendment to the Constitution contemplated a suit in courts which shall be open and in which every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and justice administered without denial or delay as guaranteed by Section 16 of

1915.]

Gas Co. v. Cincinnati.

Article I of the Constitution, and of which it became a part upon its adoption.

The commission to be appointed by the superintendent of public works is neither a court within the meaning of the Constitution, nor is the prosecution of a claim before such commission in the nature of a suit in a court of justice. This act did not, therefore, make operative said amendment to the Constitution nor carry it into effect, and while it may be the only remedy now open to the plaintiffs, it is not exclusive in the sense that it is the remedy secured by said constitutional amendment.

Motion sustained.

FAILURE TO RECOVER FOR STREET LIGHTING.

Common Pleas Court of Hamilton County.

THE UNION GAS & ELECTRIC COMPANY V. CITY OF CINCINNATI.

Decided, June, 1916.

Municipal Corporations—Action for Gas Furnished to a Village Prior to Annexation—Claim Fails Because of Failure to Show an Agreement to Pay for the Service.

The contract for lighting the streets of the village of Hartwell having expired prior to the rendition of the service for which judgment is asked, and the claim resting on *quantum meruit only*, no recovery can be had for the service rendered.

J. W. Heintzman, for plaintiff.

Constant Southworth, Assistant City Solicitor, contra.

GEOGHEGAN, J.

By consent of counsel this matter was submitted to the court without the intervention of a jury.

The cause of action set forth in the petition is one to recover the sum of \$790.64 on an account for gas furnished to the village of Hartwell for street illuminating purposes and the re-location of one of the lamps in said village.

The only evidence offered in support of this claim is the record of the annexation proceedings whereby the village of Hartwell

was annexed to the city of Cincinnati, and in which the city of Cincinnati assumed to pay all and singular the legal and valid obligations and liabilities of said village of Hartwell. No evidence is offered of any contract between the village of Hartwell and the plaintiff for the furnishing of this service, nor any ordinance of the village of Hartwell authorizing any one to contract for these services and to pay for them. In fact, it is conceded by counsel for plaintiff that the contract for illuminating the streets of the village of Hartwell had expired prior to the rendition of these services.

Therefore, from all the evidence before the court, it is clear that the recovery sought for can not be had for the reason that a municipal corporation is not liable on a *quantum meruit* for services rendered, and that in order that a recovery may be had for such services it must be shown that they were rendered under and by virtue of a contract, agreement, obligation or appropriation made and entered into according to statute. *City of Wellston v. Morgan*, 65 Ohio St., 219; *McCormick v. City of Niles*, 81 Ohio St., 246; *Village of Pleasant Ridge v. Dayton Limestone Company*, 17 C.C.(N.S.), 498.

Judgment will be entered for the defendant.

END OF VOLUME XVIII.

INDEX.

ABUTTING OWNER—

Held not liable where a child three years of age climbed upon a temporary structure erected over the sidewalk and, stepping on a loose board, fell through and was injured. 373.

ACTIONS—

Against the state—see STATE.

ADMINISTRATOR—

Procedure where the final account of an administrator, showing no debts outstanding against the estate, has been filed and confirmed and it is subsequently discovered that debts are outstanding against the estate and it is necessary to sell property to pay them. 14.

AGENCY—

An agent employed for a specified term to solicit subscriptions to the funds of an institution, is not entitled to a commission on a subscription which he solicited, but which was not promised at that time and was not made for a year after the term of his employment had expired. 400.

APPEAL—

An appeal by a guardian from a judgment terminating the guardianship must be perfected by the filing of bond within twenty days. 286.

ASSIGNMENTS—

An assignment by a contractor of unpaid estimates on work in progress is of no validity as against the claims of laborers employed on the work or of subcontractors or material-men. 167.

Property covered by a chattel mortgage becomes assets in the

hands of the assignee of the mortgagor. 489.

ATTACHMENT—

The statutory provision that no judgment upon which execution has not been issued and levied within one year after its rendition shall operate as a lien on the estate of the debtor to the prejudice of any other *bona fide* judgment creditor, applies to a suit in which an attachment was issued and levied. 404.

A judgment becomes dormant after five years unless an execution on it is sued out, notwithstanding an attachment was issued and levied on the property of the judgment debtor. 404.

A judgment rendered in 1896 in a suit in which an attachment was levied on all the judgment debtor's property, but upon which no execution was sued out until February, 1902, becomes dormant and is subordinate to a junior judgment rendered in 1900 upon which an execution was levied during that year. 404.

In an action against a non-resident a conditional order or judgment *nisi* may be entered for the full amount owing to the plaintiff, notwithstanding the garnishee had no notice of the hearing and had previously answered that he had no property or credits in his possession or under his control which belonged to the defendant. 425.

BANKRUPTCY—

As to the dormancy of a judgment in which an attachment was levied; effect of subsequent bankruptcy proceedings. 404.

BIDS AND BIDDING—

The principle of competitive bidding for municipal supplies must be held inviolate. 49.

Specifications are inadmissible which are so drawn as to admit of the goods manufactured by only one concern. 49.

BILL OF SALE—

A bill of sale given to secure a loan is in effect a chattel mortgage only, and where not filed for record creates no lien on the property covered and has no validity against creditors of the party by whom it is executed. 167.

BOARD OF HEALTH—

Authority of, to employ ward physician to attend upon cases of contagious diseases. 419.

BOYCOTTS—

The recently enacted federal statute, known as the Clayton act, does not withdraw the protection of the law from tradesmen whose business it is sought to ruin by a secondary boycott. 465.

A boycott of customers of a wholesale concern, for the purpose of compelling said concern in order to preserve its business to treat with representatives of the labor union ordering the boycott, is an unlawful interference with the rights of persons with whom the union has no relation, and constitutes a secondary boycott, which is not permissible and may be enjoined. 465.

BRIDGE—

Voluntary repair of, by a municipality, where an interurban railway company, prior to annexation of that territory to the city, had contracted to make necessary repairs. 553.

BUILDING—

Signs painted on a party wall can not be obliterated or interfered with by the owner or lessee of the adjoining property to which one-half of the wall belongs. 547.

A party to an agreement whereby a party wall was erected, which stands half upon the land of each, may use the side of the wall resting on his own land for any purpose which does not impair its strength or interfere with its use as a party wall. 547.

BUILDING COMMISSION—

A court house building commission is governed by the provisions of Section 2355, requiring contracts to "be awarded to and made with the person who offers to perform the labor and furnish the materials at the lowest price." Decision in *Mackenzie v. State*, 76 Ohio State, abrogated by the subsequent amendment of Section 2338. 97.

Where the controlling statute requires that public contracts be awarded to the lowest bidder, specifications are valid which call for bids upon the use in the alternative of various materials and methods of construction, and the final adoption of one of the alternatives may be reserved until all the bids have been opened and computed. 97.

CANALS—

The act authorizing appointment of commissioners, to consider claims against the state for damages to private property resulting from overflow of water from canal system, does not provide a remedy by suit against the state within the meaning of the amendment. 609.

CHARGE OF COURT—

A charge defining contributory negligence, and directing the jury to apply the definition in the event of finding a given state of facts, is not withdrawing the case from the consideration of the jury. 260.

In an action against a druggist for damages on account of wrongful death from the sale of a poisonous drug, it is not error to

instruct the jury that the druggist was bound to use ordinary care, and if he gave the drug asked for together with some other drug of a poisonous nature there was a failure to exercise ordinary care and he became liable. 361.

As to a preponderance of the evidence. 361.

CHATTEL MORTGAGE—

Mortgaged personalty becomes assets in the hands of the assignee of the mortgagor. 489.

The description of property covered by a chattel mortgage should be liberally construed; parol evidence is admissible to aid or explain the description of chattels covered by mortgage; descriptions which are good at the time of the execution of the mortgage but which, in a continuing business, become void later for uncertainty; chattel mortgage held valid as to certain property named therein, but void as to "all stock in trade" and "stock of merchandise on hand." 489.

CIVIL SERVICE—

A vacancy can not be created in the municipal service by an ordinance which abolishes the position and re-establishes exactly the same position under a different name. 145.

Rights of incumbents of offices which have been abolished; names once placed on the eligible list can not be removed; council can not fix by ordinance the qualifications to be required of applicants. 145.

Necessary parties to a determination as to whether appointments have been legally made. 145.

CONSENTS—

To the building of a street railway can not be given by owners of property which will abut on a proposed street which has not been established by ordinance and the right-of-way of which has not been acquired by the municipality, 1,

CONSTITUTIONAL LAW—

Section 8866, relating to the elimination of grade crossings, is invalid in so far as it attempts to confer judicial power. 25.

Section 27 of the workmen's compensation act is in contravention of the constitutional guaranty of the right to trial by jury, and is therefore void and of no effect. 177.

Section 16 of Article I of the Constitution, adopted September 3, 1912, providing that "suits may be brought against the state, in such courts and in such manner as may be provided by law," is not self-executing, but requires subsequent legislation to give it effect, and until such legislation is provided the amendment is inoperative and confers a mere right without a remedy for its enforcement. 609.

CONTEMPT—

The power of a court to commit for contempt does not give authority for committing a witness who has answered all questions put to him, but has impressed the court with the belief that his answers are untrue; mere suspicion that his answers are untrue is not sufficient. 385.

Right of a witness to purge himself of contempt. 385.

CONTRACTS—

Acquiescence in the provisions of a contract. 569.

Recitals on a certificate of preferred stock constitute a contract. 569.

Validity of a contract whereby a railway company acquires land in consideration of free transportation to the owner, his wife and children during their natural lives. 537.

CORPORATIONS—

There is no hard and fast rule in Ohio for disposition of stock dividends as between a life tenant and the remaindermen; when such

a dividend will be ordered paid to the life tenant, and when such dividends will be treated as part of the corpus of the estate. 436.

Where the entire assets of a corporation are sold to another company, and payment is made by issuing to the stockholders of the selling company shares in the purchasing company which are cumulative and preferred both as to dividends and assets, redeemable at any time at par with accrued dividends at the option of the purchasing company, the holders of said preferred stock have no right to demand a rate of dividend higher than that named in the certificate or to share in the dividends which are being paid on the common stock. 569.

Absence from a certificate of incorporation of any provision for issuing preferred stock does not change the temporary character of preferred stock which may have been issued in payment for the assets of another company, or invest it with profit sharing qualities in addition to its interest bearing and preferential character. 569.

A certificate of preferred stock, expressing on its face a limitation as to the interest rate and providing for a fixed preferential cumulative dividend, is a contract for a dividend which can not be changed or passed by the corporation if profits are realized. 569.

Admissibility of entries in stock ledger for the purpose of showing transfer of stock; possession of a stock certificate, unendorsed, is not conclusive evidence of ownership; waiver of the provisions for endorsement and surrender may be inferred, when. 585.

COUNTY COMMISSIONERS—

Jurisdiction of county commissioners in the matter of the repair of roads which lie in part within the limits of a municipality. 580.

CRIMINAL LAW—

It is not inconsistent for a jury to find a defendant not guilty of forgery or the uttering of a forged check, but guilty of false pretenses in obtaining money upon a check which had been raised. 161.

It is within the discretion of the court to reopen a case for the purpose of calling a witness to testify as to a point involved in a special charge which has been asked. 161.

A motion lies to strike out the answer of an impeaching witness, whose reply to a question as to whether the reputation of the person named was good or bad was, "well, with me it has been bad." 161.

An attempt to pick a pocket does not render the offender liable to prosecution for pocket picking where the attempt failed. 206.

The pronouncing of sentence in a criminal case may be delayed for a reasonable time to hear and determine a motion for a new trial, or to give the defendant time to perfect an appeal or writ of error, or for other proper causes; but in the absence of a permissive statute a trial court can not suspend indefinitely the pronouncing of sentence or the execution of judgment. 273.

The fact that an automobile was seen going along a public highway at a speed greater than the law allows does not, without other evidence, afford ground for prosecuting the owner. 457.

The constitutional amendment, relating to the failure of a defendant in a criminal prosecution to take the stand and testify, in no way lessens the proof required before a conviction can be had, nor does it change the settled rule of procedure that before a defendant can be called upon to produce his defense the state must prove every essential element of the crime charged. 457.

A court is without authority to suspend a sentence after the term at which it was passed. 581.

CONTRACTOR—

The lien of creditors of a contractor, bonded by an insolvent foreign surety company, upon the Ohio deposit of that company is superior to that of the superintendent of insurance of the company's home state. 380.

CROSSINGS—

Proceedings where an overhead crossing of an interurban road interfered with the grade crossing elimination work of a steam road spanned by said overhead crossing. 289.

The power of railway companies to agree as to crossings is subservient to the public interest. 289.

DAMAGES—

The fact that an injured employee has received an award for an injury under the workmen's compensation law is not a bar to a suit by him against a stranger for negligently causing the same injury. 42.

The sum mentioned as liquidated damages, in a contract of purchase and sale of goods, having a market value which can be ascertained with reasonable certainty, will be regarded as a penalty and the plaintiff remitted to an action for the actual damages sustained by reason of the countermending of the order. 447.

Damages in the sum of \$40,000 awarded to one of large earning power who was very badly hurt in an automobile collision. 473.

DEVISE—

A devise of "all my property both real and personal of which I may die seized to my husband * * * to him and his heirs forever" is sufficient to carry with it the proceeds of a policy of life insurance on the life of the husband and made payable to the wife. 42.

DISCRETION—

It is within the discretion of the court to reopen a case for the purpose of calling a witness to testify as to a point involved in a special charge which has been asked. 161.

DISMISSAL—

The right to dismiss without prejudice exists up to final submission. 33.

DIVIDENDS—

As to disposition of stock dividends as between life tenant and remaindermen. 436.

DIVORCE AND ALIMONY—

Character of the allowance which may be made to a wife divorced on her own aggression. 175.

Mere failure to provide does not constitute ground for divorce in this state, where not accompanied by circumstances of such aggravation and indignity as would warrant its being termed gross neglect of duty. 521.

DRUGGIST—

Liability of, for selling cyanide of potassium with Rochelle salts with a fatal result to the person by whom the salts were taken. 361.

EJECTMENT—

One who has conveyed land to a railway company in consideration of free transportation to himself, his wife and children during their natural lives, may upon withdrawal of such transportation by the railway company in view of the provisions of the Hepburn act, maintain an action in ejectment against said company. 537.

ELECTIONS—

Signatures to a referendum petition may be made with an indelible pencil, but the name of the signer must be written by himself; date of signing and residence of signer are material but

may be written in by another; definiteness as to residence of signers. 140.

Grounds of contest must be so stated as to disclose an actual claim or irregularity; an order that the ballots be opened will not be made, where the purpose is to discover errors which have not been alleged or claimed; court without power to open the ballots for an absolute recount before any testimony has been offered which tends to show errors in particular precincts. 193.

The right of suffrage should not be denied to a voter because of his failure to follow the strict letter of the law in the marking of his ballot, and a ballot showing irregular markings and erasures by a voter who evidently acted with an honest purpose should be counted, if his intention can be ascertained with reasonable certainty. 500.

ERROR—

In the assumption by counsel of the judicial prerogative of advising a witness. 473.

Jurisdiction can not be conferred by waiver, where an error proceeding is not brought within the prescribed time. 483.

ESTOPPEL—

Application of the principle of, to holders of subsequent interests under a will.

EVICITION—

Where premises are surrendered after a judgment of eviction the tenant has no claim against the landlord in tort for damages on account of an unjustifiable eviction. 534.

EVIDENCE—

A motion lies to strike out the answer of an impeaching witness, whose reply to a question whether the reputation of the person named was good or bad, was "Well, with me it has been bad." 161.

In an action for damages on account of the sale of Rochelle

salts alleged to have contained cyanide of potassium, it is not error to permit a third person to testify that he had purchased Rochelle salts of the defendant a short time before the plaintiff's purchase was made and no injury resulted from the use of said salts. 361.

Entries in a stock ledger are admissible for the purpose of showing transfer of stock, when. 585.

EXECUTION—

The three-fourths jury law is not applicable to an issue submitted to five disinterested electors as to the right of property levied upon under execution; the order of the justice in such a case may be reviewed in the common pleas court. 24.

A saloon license is not personal property, in this state, in the sense that it is subject to levy and execution. 596.

If a judgment debtor is adjudicated a bankrupt, the lien of a judgment on which an execution has been levied within a year of its rendition is not lost if no further execution is sued out within five years after the first execution. 404.

EXPLOSIVES—

The owner of a garage is not liable to an adjoining owner whose property was destroyed by fire resulting from an explosion of high pressure gasoline kept in the garage for sale at retail. 120.

GAS—

A claim for street lighting after the contract for such service had expired in a claim based on *quantum meruit* only, and recovery can not be had therefor. 615.

GAS AND OIL—

A tank of high pressure gasoline may be kept in a garage for sale at retail without liability for negligence. 120.

GRADE CROSSINGS—

Invalidity of the act relating to the elimination of grade crossings which attempts to confer judicial power. 29.

Answer of a railway company alleging that it is unable to carry out its agreement to eliminate certain grade crossings on account of difficulty in raising money, held to be good against demurrer in an action to compel enforcement of the agreement. 29.

GUARANTY—

The statute permitting steam and commercial railroads to give assistance to other like companies, in the form of a guaranty or otherwise, has no application to interurban companies. 298.

GUARDIAN AND WARD—

An appeal by a guardian from a judgment terminating a guardianship is not in the interest of the trust and requires that the appeal be perfected by the filing of bond within twenty days. 286.

HUSBAND AND WIFE—

A policy of insurance on the life of a husband made payable to his wife, vests in the wife as soon as issued. 33.

Where a decree of divorce is granted on the aggression of the wife, the fact that the allowance which is made to her is referred to in the decree as alimony does not change its character from an allowance made to her out of his estate, and so much thereof as remains unpaid at his death becomes a charge against his estate. 175.

INITIATIVE AND REFERENDUM—

The Governor is authorized to make an investigation as to alleged fraud in the use of the initiative and referendum. 505.

INJUNCTION—

Lies in the matter of the purchase of municipal supplies where

the specifications are so drawn as to admit the goods of but one manufacturer. 49.

Does not lie to prevent payment of salary to a county superintendent of schools in a suit by a taxpayer. 198.

Lies against a secondary boycott. 465.

Lies against the placing or maintenance of wagon scales in the street, when. 601.

INSANE—

A hospital for the insane, though public, is not necessarily a state institution; it may be built by county taxation, and bonds issued therefor by the county commissioners, and bonds may be issued for repair of existing buildings or the erection of new buildings. 564.

The commissioners of Hamilton county have authority to issue bonds for the purpose of repairing buildings belonging to Longview Hospital or for erection of additional buildings. 564.

INSURANCE—

A policy of insurance on the life of a husband made payable to his wife vests an interest in the wife the moment the policy is issued and said interest may be passed by her by will. 33.

INTERURBAN RAILWAYS—

An interurban railway company can not give assistance to another company of the same class, whether in the form of a guaranty or otherwise. 298.

INTOXICATING LIQUORS—

A saloon license is not property, but a privilege, and is not subject to levy and execution. 596.

JITNEY BUSES—

Operation of, may be regulated. 81.

JOINT ENTERPRISES—

As between a driver and his wagon boy. 409.

JURISDICTION—

To sell property to pay debts can not be entertained after the filing and confirmation of a final account by the administrator showing no debts against the estate; proper method of correcting such a situation where it is discovered that there are debts outstanding against the estate. 14.

In attachment against a non-resident not lost by the filing of an answer by the garnishee that he has no property in his possession belonging to the defendant. 425.

Can not be conferred in an error proceeding by waiver of service of summons and voluntary entry of appearance by the defendant, when the petition in error and the bill of exceptions were not filed within the statutory time. 483.

JURY—

The three-fourths jury law is not applicable to a case involving the issue as to the right of property levied upon under a writ of execution. 24.

Discussion by a jury, after retirement, as to the ability of the defendant to pay the proposed verdict, not ground for a new trial. 293.

LABOR UNION—

May not maintain a secondary boycott. 465.

LACHES—

Individual laches by a taxpayer seeking to enjoin performance of a public contract is not a bar to his suit in the representative capacity of a tax-payer. 97.

Held not to bar prosecution of the claim of subsequent devisees whose interests have been transferred by the first holders. 209.

LANDLORD AND TENANT—

Application of the doctrine of *res ipsa loquitur* to the case of the bursting of a water pipe, causing damage to a tenant's stock of goods. 487.

A tenant who surrendered possession of premises after a judgment of eviction had been rendered against him by a magistrate has no claim against the landlord in tort for damages on account of an unjustifiable eviction. 534.

LIBEL AND SLANDER—

The question of the ultimate fact of privilege in making a publication is for the jury to determine, where the facts are disputed as to the existence of express malice or there be some evidence of inaccuracy of the report published—in this case a publication of an arrest for perjury as the result of an investigation. 505.

Where the fact of privilege is shown a presumption arises that the publication was without malice, which remains with the defendant until rebutted by evidence of express malice. 505.

The word "maliciously" as used in the statutes with reference to publication of court proceedings, etc., means express malice. 505.

Express malice is a question for the jury, where there is some evidence tending to establish it; how shown against individuals and how against a corporation. 505.

The truth of a publication, though not pleaded, becomes an issue if the plaintiff offers evidence tending to show the falsity of the charges, and the question as to truth must be determined prior to that of privilege and malice. 505.

An investigation by the Governor as to alleged frauds in the use of the initiative and referendum constitutes a proceeding, with reference to which impartial reports may be made if not made maliciously. 505.

The date of the filing of an affidavit for the issue of a warrant of arrest is controlling, where a question of privilege with reference to a publication of the arrest is raised. 505.

LICENSE—

A saloon license is not subject to levy and execution. 596.

LIENS—

A lien is not created by an unrecorded bill of sale given to secure a loan. 167.

Of creditors of a contractor bonded by an insolvent foreign insurance company. 380.

LIFE TENANT—

When a stock dividend will be ordered paid to the life tenant rather than to the remaindermen. 436.

MASTER AND SERVANT—

A son or step-son is not the servant or agent of his father or step-father unless he is actually engaged in carrying out some purpose of the father or step father. 355.

MISCONDUCT—

As to on the part of a jury, which had retired for deliberation, in discussing the defendant's ability to pay the amount of the proposed verdict. 293.

MISREPRESENTATIONS—

Where the truth or falsity of representations could have been ascertained by the exercise of diligence, equity will not grant relief. 76.

Representations can not be treated as an assurance of future events. 76.

A transfer of property will not be set aside on the ground of false representations as to its not being subject to overflow in time of flood in the river upon which it abuts, where the facts of the land being overflowed in the past were known to persons living in the vicinity. 76.

MOTOR VEHICLES—

The owner of an automobile can not be punished by fine and costs for exceeding the speed limit with his automobile, where the only evidence against him is that his

machine was seen going along a public highway at a speed greater than that allowed by law. 457.

MUNICIPAL CORPORATIONS—

Counsel speaks only through its records, and the announcement of an intention to act is not equivalent to action carrying such intention into effect. 1.

Consents to the building of a street railway along a proposed street, to pass through park property and property thereafter to be acquired for park purposes, are invalid. 1.

The consents required for the building of a street railway is the consent of the requisite number of owners of property abutting on a street then existing, and owners of property on a proposed street over which the road is to pass can not be counted. 1.

As to the enforcement of grade crossing elimination agreements; answer of the railway company alleging inability to comply with its agreement on account of difficulty in raising the necessary funds, held good against demurrer. 25.

The principle of competitive bidding has been carried into the new Cleveland charter. 49.

Injunction will lie against acceptance of the proposal of one manufacturer, where it appears that the specifications were so drawn that others were unable to take part in the competition. 49.

The principle of competitive bidding in the purchase of municipal supplies is of such importance and is so imbedded in the law of the state, that some inconvenience or loss in a particular instance does not afford a sufficient reason for departing therefrom. 49.

Municipalities in their control of the streets and the exercise of general police powers may regulate the operation of jitney busses. Such regulation should be reasonable, but sufficiently effective to provide for the safety of the people and protect property rights. 81.

It is not unreasonable to require one who operates jitney

busses to give bond to respond in damages to any who may be injured through his negligence; and he may be required to render continuous service, in bad weather as well as good, and to employ no chauffeur who can not speak English, and to be held to the same degree of care as common carriers. 81.

Section 5649-2, General Code, repeals by implication the authority vested in a municipal council to sell bonds without a vote of the people. 94.

The ten mills limitation provided in Section 5649-2 covers the annual spending money for the several taxing districts, and a municipality is without authority to sell bonds and create a debt which must be paid out of the fund so raised. 94.

Only by a vote of the people can a bonded indebtedness be created against a municipality. 94.

Liability for negligence in the care of public parks; injury to a pedestrian on defective steps; governmental and proprietary functions of municipalities. 129.

Illegal appointments under the civil service; council can not by ordinance fix the qualifications of applicants. 145.

The board of health of a city is not authorized to contract for the general employment of a district or ward physician to attend upon cases of contagion, unless such employment is authorized or consented to by action of the city council. 419.

Where a physician is employed by the board of health, without consent of the city council, to attend upon all cases of small-pox existing or thereafter developing in the city during the term of his employment, the contract is illegal and void and payment for such services can not be compelled by mandamus. 419.

The repair by a municipality of a bridge on a free turnpike, used by an interurban railway and which it had contracted to keep

in repair, is a voluntary act and the municipality, to which the territory was afterward annexed, can not recover therefor. 553.

Jurisdiction of county commissioners in the matter of the repair of roads lying in part within the limits of a municipality. 560.

A municipal council is without authority to grant the right to place wagon scales in a public street for the benefit of an abutting owner or any private interest. 601.

Where scales so placed obstruct the gutter and cause surface water to collect and become stagnant, interfere with ingress and egress to abutting property, and cause an increase in the amount of dust, litter and refuse which accumulate in the street, a nuisance is created against which injunction lies. 601.

Where the contract for supplying a municipality with gas expired prior to the rendition of the service for which judgment is asked, the claim rests on *quantum meruit* only, and no recovery can be had. 615.

NATIONAL GUARD—

The National Guard, which is the modern designation for an organized, disciplined and equipped militia, is a constitutional body; when so ordered, attendance of the Ohio organization in joint maneuvers with the Regular Army is compulsory. 91.

A janitor of a public school who discharged an assistant janitor for attending such maneuvers of the National Guard of which he was a member is answerable in damages. 91.

NEGLIGENCE—

The owner of a garage is not liable for destruction by fire of adjoining property resulting from an explosion of gasoline in the garage, when. 120.

The keeping of a tank of high pressure gasoline in a garage for sale at retail is not negligence. 120.

In the management of a public park resulting in injury to a pedestrian. 129.

Liability for injuries as between a gas company and the city: bar of a previous action; effect of a contract of indemnity; tort feorsors who are not joint. 158.

A street car company is required to exercise only ordinary care toward persons who have left a car and are proceeding to cross a parallel track, the relationship of carrier and passenger ceasing after the passenger has alighted in safety. 260.

A charge defining contributory negligence and directing the jury to apply the definition in the event of finding a given state of facts is not a withdrawal of the case from consideration of the jury. 260.

Construction of the workmen's compensation act with reference to negligence. 305.

A step-father will not be held liable for injuries caused by the negligent operation of his automobile by his stepson unless it appears that at the time of the accident the stepson was acting as the servant or agent of his step-father. 355.

Where a druggist sold poison mixed with Rochelle salts with a fatal result to the person by whom the salts were taken. 361.

Where a child three years of age climbed upon a temporary structure erected over the sidewalk and, stepping on a loose board, fell through and was injured; abutting owner not liable. 373.

Question of joint enterprise as between a driver and his wagon boy; whether they were fellow-servants was a proper question for the jury under the testimony and proper instructions by the court. 409.

The rule of "stop, look and listen" is not applicable to the case of a chauffeur driving his car out of a side street onto a main thoroughfare. 473.

Heavy damages awarded in the case of one of large earning power who was very badly hurt in a collision of a machine on a main thoroughfare with his own car as it emerged from a side street. 473.

Where a water pipe burst on premises controlled by the defendant, and water ran down on the stock of goods of the plaintiff in the store below, and no evidence is introduced showing the cause of the bursting of the pipe, the doctrine of *res ipsa loquitur* applies and the issue of negligence on the part of the defendant should be submitted to the jury. 487.

The personal representative of a workman, who met his death in the course of his employment through the negligence of a third person, is not barred from bringing an action against such third person by reason of the fact that he has already accepted payment from the state insurance fund. 526.

NUISANCE—

A nuisance is created by the placing of wagon scales in the street, against which injunction will lie, when. 601.

OFFICE AND OFFICER—

A county superintendent of schools, appointed by the county board of education, is a public officer. 198.

PARKS—

Pedestrian injured on defective steps in a public park may recover from the municipality, when. 129.

PARTIES—

Necessary parties to a determination as to whether an appointment has been legally made under the civil service law. 145.

PARTY WALL—

See BUILDINGS.

PHYSICIAN AND SURGEON—

Authority of board of health to employ ward physician to attend cases of contagious disease. 419.

PLEADING—

Accuracy with which the grounds for a proposed contest of an election should be stated. 193.

Allegations as against demurrer, which constitute a railway an interurban railway as to a part of its business. 393.

PROMISSORY NOTES—

The payee of a note executed by an employee of a contractor, the proceeds of which were used in prosecuting the work, is a creditor of the maker of the note, and not of the contractor to whom the money went, and the maker of the note is only a general creditor of the contractor. 167.

PUBLIC CONTRACTS—

One who sues as a tax-payer to enjoin the performance of a public contract on the ground that the specifications are invalid is not estopped by the fact that as an advocate of unsuccessful bidders he endeavored to procure for them the award of the contract; nor is he barred by individual laches. 97.

Specifications are valid which call for bids for use in the alternative of various materials and methods of construction, and the final adoption of the alternatives may be reserved until all the bids have been opened and computed. 97.

RAILWAYS—

Proceeding to compel an interurban railway company to remove an overhead crossing which interferes with the grade crossing elimination work of a steam road, or for a decree fixing the mode of such crossing and dividing the initial and maintenance expense between the two companies. 289.

The statute permitting steam and commercial railways to give assistance to other like companies, in the form of a guaranty or otherwise, has no application to interurban railways, and a claim based upon such a guaranty can not be

asserted against a road in the hands of a receiver. 298.

A showing that such a guaranty was assented to by the stockholders is of no avail where both companies were dominated by one man through stock ownership, and the bonds upon which the guaranty was given were sold to this man in order to reimburse him for money used in construction. 298.

The distinction between a railroad company and an interurban railroad company is not found in its motive power, but rather in the frequency of the service it is rendering and of the character of its business and the number of stops made by its trains. 393.

A single transportation operation may be divided into two parts, and the carrier for the purpose of fixing its excise tax may be regarded as a railroad company as to a part of its business and as an interurban railroad company as to the remainder. 393.

Allegations which as against demurrer, constitute a railroad an interurban railroad as to a part of its business. 393.

A railway company is not at liberty, in view of the provisions of the Hepburn act, to withdraw free transportation contracted for with a land owner in exchange for land, and if such transportation is withdrawn the land owner may maintain an action in ejectment. 437.

RECEIVER—

Exceptions to expenses incurred by. 167.

REFERENDUM—

As to the sufficiency of a referendum petition. 140.

RES IPSA LOQUITUR—

See NEGLIGENCE.

RESPONDEAT SUPERIOR—

The mere relation of father and son, or step-father and step-son, is not of itself sufficient to make the son the servant of the father within the meaning of the doctrine of *respondere superior*. 355.

And this is true even though the son or step-son is a member of the father's or step-father's household. 355.

ROADS—

Emergency funds, raised under Section 7419, can not be used by county commissioners for rebuilding a worn-out road, nor can a contribution be made from such funds toward the rebuilding of that part of such a road as lies within municipal limits. 560.

The jurisdiction of county commissioners over a road lying within the limits of a municipality is limited to the repair of such a road up to the point where the sidewalks have been curbed and guttered, and no further. 560.

The funds available for repair of a road within municipal limits are those raised under Section 7422, rather than Section 7419, G. C. 560.

SALES—

Measure of damages under the sales act for breach of contract to take goods. 447.

SCALES—

The placing and maintenance of wagon scales in the street may be enjoined, when. 601.

SCHOOLS—

A county superintendent of schools, appointed under the county board of education, under the act of 1914, is a public officer and as such his eligibility or title to the office can not be brought in question in a suit by a tax-payer to enjoin payment of his official salary. 198.

SENTENCE—

A trial court can not, in the absence of a permissive statute, suspend indefinitely the pronouncing of sentence or the execution of judgment in a criminal case. 273.

A court is without jurisdiction to suspend a sentence after the term has passed at which the sentence was pronounced. 581.

Application for a suspension of sentence in order to enable the defendant to prosecute error, is a waiver of any right to apply at a later date for an indefinite suspension or a suspension during good behavior, subject to the terms of probation provided by law. 581.

SHERIFF—

Funds held by, awaiting determination of legal rights, are not subject to taxation. 377.

STATE—

The constitutional amendment providing that, "suits may be brought against the state, in such courts and in such manner as may be provided by law," is not self-executing and requires subsequent legislation to give it effect, and until this is done the amendment is inoperative and confers a mere right without a remedy for the enforcement thereof. 609.

STATUTES CONSIDERED—

Section 8866, relating to the elimination of grade crossings. 29.

Section 5649-2, known as the tax levy limitation statute. 94.

Section 2333, relating to building commissions. 97.

Section 2338, relating to public contracts entered into by building commissions. 97.

Section 2355, relating to the adjournment of the letting of public building contracts from day to day. 97.

Section 1465-74, otherwise known as Section 27 of the workmen's compensation act. 177.

Section 11209, relating to the giving of bond by a party appealing in a fiduciary capacity. 286.

Section 4408, *et seq.*, relating to appointment of ward or district physicians. 419.

Sections 11851-3, relating to actions and judgments against garnishees. 425.

Sections 11343-1 and 11343-2, relating to malice in the publication of duly authorized "proceedings." 505.

Section 7419, providing a tax levy for road repairs. 560.

Section 7422, providing a maximum levy for road repairs. 560.

Section 2434, empowering county commissioners to borrow money for erection of county buildings. 564.

Section 2333, providing for appointment of a commission to erect a court house or other county building. 564.

STREET RAILWAYS—

The relation of carrier and passenger ceases after the passenger has alighted in safety, and where the passenger is injured by being struck by a car on a parallel track the company can be held to only ordinary care. 260.

STREETS—

As to the giving of consents by abutting owners to the building of street railway. 1.

SURETY COMPANY—

The lien of creditors of a contractor, bonded by a foreign surety company, upon the Ohio deposit of that company is superior to that of the superintendent of insurance of the company's home state. 380.

SUMMONS—

Waiver of and entry of appearance does not confer jurisdiction in an error proceeding which has not been filed within the statutory time. 483.

TAXATION—

Money in the hands of the sheriff derived from a sale of property in partition, and which he is ordered by the court to invest and hold while awaiting determination by the court of the rights of rival claimants thereto, should not be returned by the sheriff as "accounting officer" or otherwise. 377.

Determination of the amount of excise tax due from a railroad company. 393.

TORT FEASOR—

See WORKMAN'S COMPENSATION.

TORTS—

Tortfeasors who are not joint. 158.

TRUSTS—

Effect on the devising clause of a trust created in subsequent clauses of the will. 209.

Where the creator of a trust is silent as to what disposition shall be made of stock dividends, the purpose of the company with reference to the character of the distribution they are making will control, and where it is expressly stated by the company that it is a dividend payable out of current earnings, it will be ordered paid to the life tenant. 436.

VENDOR AND PURCHASER—

Measure of damages under the sales act for breach of agreement to take goods; a stipulation as to liquidated damages in case of such a breach is unenforceable when the market value of the goods can be ascertained with reasonable accuracy and the actual damages sustained by reason of the breach thus ascertained. 447.

VERDICT—

A verdict of \$15,000 for the loss of a leg by a boy treated as excessive and reduced to \$10,000. 409.

The sanction which attaches to a verdict returned on third trial. 473.

It is not inconsistent for a jury to find a defendant not guilty of forgery or the uttering of a forged check, but guilty of false pretenses in obtaining money on a check which had been raised. 161.

VOLUNTEER—

Municipality a volunteer in repairing a bridge which an interurban railway company used and had contracted to keep in repair. 553.

WAIVER—

Of the provision of a stock certificate for endorsement and surrender may be inferred, when. 585.

Application for a suspension of sentence in order to enable the defendant to prosecute error is a waiver of any right to apply at a later date for an indefinite suspension or suspension during good behavior. 581.

WATER AND WATER-COURSES

As to damages from the overflow of water from the canals upon private property—see CANALS.

WILLS—

Devising clause construed in the light of a trust created by other clauses. 209.

Executory devises placing limitations on future interests; quit claim deeds and written transfers by devisees ineffectual to convey the estates covered thereby; effect of such conveyances when treated in the light of equitable contracts; relief in cases of such conveyances not barred by laches or estoppel. 209.

WORDS AND PHRASES—

Meaning of the words "course of employment" as used in the workmen's compensation act. 305.

Meaning of the word "share" as applied to corporate stock. 569.

WORKMEN'S COMPENSATION—

Section 27 of the act is unconstitutional, and an action against an employer for failing to comply with an order of the industrial commission is not maintainable. 177.

An award made by the industrial commission held to have been insufficient and is increased. 266.

The workmen's compensation act in no way bars an injured employee from recovery of damages from a person other than his employer who may have negligently inflicted injury upon him while in the course of his employment. 305.

"Course of employment" under the compensation act is less restricted in meaning than under

the general doctrine relating to scope of employment. 305.

The negligent employer is to be treated as though the act never existed, and unless the defense of assumption of risk is denied by the Norris act, or other related statutes, it remains. 305.

The finding of the commission on the question of course of employment is final and can not be disturbed. 305.

Pleading with reference to the fact of the defendant being a contributor or non-contributor to the fund and the effect of allegations with reference thereto. 305.

As to the promulgation by the commission of general orders for the protection of the lives, safety and general welfare of employees. 305.

The Ohio compensation act is penal in character. 305.

As to the effect of violation of a penal statute on civil liability. 305.

The doctrine of *Railway v. Frey*, 80 O. S., 289, as to the limit of an employer's liability and provision of a safe place to work, must be applied under the compensation act. 305.

It can not be held that an employer is an insurer of the safety of the place of employment. 305.

A minor who has made application to the state board of awards for compensation can not thereafter disaffirm his election on the ground of his minority. 305.

When a workman has been killed by the actionable negligence of a third person, the fact that his personal representative has already received payment from the state insurance fund does not bar such representative from maintaining an action against the tortfeasor for damages, and the further fact that the tortfeasor has contributed to the state insurance fund does not affect his liability. 526.

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